

**U.S. Bankruptcy Court
Eastern District of Michigan (Detroit)
Bankruptcy Petition #: 13-53846-swr**

Date filed: 07/18/2013

Assigned to: Judge Steven W. Rhodes
Chapter 9
Voluntary
No asset

Debtor In Possession
City of Detroit, Michigan
2 Woodward Avenue
Suite 1126
Detroit, MI 48226
WAYNE-MI
Tax ID / EIN: 38-6004606

represented by **Bruce Bennett**
555 S. Flower Street
50th Floor
Los Angeles, CA 90071
(213) 489-3939
Email: bbennett@jonesday.com

Judy B. Calton
Honigman Miller Schwartz & Cohn LLP
2290 First National Building
Detroit, MI 48226
(313) 465-7344
Fax : (313) 465-7345
Email: jcalton@honigman.com

Eric D. Carlson
150 West Jefferson
Suite 2500
Detroit, MI 48226
313-496-7567
Email: carlson@millercanfield.com

Timothy A. Fusco
150 West Jefferson
Suite 2500
Detroit, MI 48226-4415
(313) 496-8435
Email: fusco@millercanfield.com

Eric B. Gaabo
1650 Frist National Building
Detroit, MI 48226
(313) 237-3052
Email: gaabe@detroitmi.gov

Jonathan S. Green
150 W. Jefferson
Ste. 2500
Detroit, MI 48226
(313) 963-6420
Email: green@millercanfield.com

David Gilbert Heiman
901 Lakeside Avenue
Cleveland, OH 44114

(216) 586-7175
Email: dgheiman@jonesday.com

Robert S. Hertzberg
4000 Town Center
Suite 1800
Southfield, MI 48075-1505
248-359-7300
Fax : 248-359-7700
Email: hertzbergr@pepperlaw.com

Deborah Kovsky-Apap
Pepper Hamilton LLP
4000 Town Center
Suite 1800
Southfield, MI 48075
(248) 359-7300
Fax : (248) 359-7700
Email: kovskyd@pepperlaw.com

Kay Standridge Kress
4000 Town Center
Southfield, MI 48075-1505
(248) 359-7300
Fax : (248) 359-7700
Email: kressk@pepperlaw.com

Stephen S. LaPlante
150 W. Jefferson Ave.
Suite 2500
Detroit, MI 48226
(313) 496-8478
Email: laplante@millercanfield.com

Heather Lennox
222 East 41st Street
New York, NY 10017
212-326-3939
Email: hlennox@jonesday.com

Marc N. Swanson
Miller Canfield Paddock and Stone, P.L.C
150 W. Jefferson
Suite 2500
Detroit, MI 48226
(313) 496-7591
Email: swansonm@millercanfield.com

U.S. Trustee
Daniel M. McDermott

represented by **Sean M. Cowley (UST)**
United States Trustee
211 West Fort Street
Suite 700
Detroit, MI 48226
(313) 226-3432
Email: Sean.cowley@usdoj.gov

Richard A. Roble (UST)
United States Trustee
211 West Fort Street
Suite 700
Detroit, MI 48226
(313) 226-6769

Email: Richard.A.Roble@usdoj.gov

Creditor Committee
Committee of Unsecured
Creditors
TERMINATED: 03/03/2014

represented by **Brett Howard Miller**
1290 Avenue of the Americas
40th Floor
New York, NY 10104
(212) 468-8051
Email: bmiller@mofo.com, whildbold@mofo.com
TERMINATED: 03/03/2014

Geoffrey T. Pavlic
25925 Telegraph Rd.
Suite 203
Southfield, MI 48033-2518
(248) 352-4700
Fax : (248) 352-4488
Email: pavlic@steinbergshapiro.com
TERMINATED: 03/03/2014

Mark H. Shapiro
25925 Telegraph Rd.
Suite 203
Southfield, MI 48033-2518
(248) 352-4700
Fax : (248) 352-4488
Email: shapiro@steinbergshapiro.com
TERMINATED: 03/03/2014

Creditor Committee
Charlene Hearn
PO Box 6612
Detroit, MI 48206

Retiree Committee
Official Committee of Retirees

represented by **Sam J. Alberts**
1301 K Street, NW
Suite 600, East Tower
Washington, DC 20005-3364
(202) 408-7004
Email: sam.alberts@dentons.com

Paula A. Hall
401 S. Old Woodward Ave.
Suite 400
Birmingham, MI 48009
(248) 971-1800
Email: hall@bwst-law.com

Claude D. Montgomery
620 Fifth Avenue
New York, NY 10020
(212) 632-8390
Email: claudemontgomery@dentons.com, docketny@dentons.com

Carole Neville
1221 Avenue of the Americas
25th Floor
New York, NY 10020
(212) 768-6889
Email: carole.neville@dentons.com

Matthew Wilkins
401 S. Old Woodward Ave.

Suite 400
 Birmingham, MI 48009
 (248) 971-1800
 Email: wilkins@bwst-law.com

Filing Date	#	Docket Text
08/09/2013	<u>316</u>	Transcript regarding Hearing Held 08/02/13 RE: Status Conference. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 91 DAYS AFTER THE DATE OF FILING, TRANSCRIPT RELEASE DATE IS 11/8/2013. Until that time, the transcript may be viewed at the Clerk's Office by parties who do not receive electronic notice and participated in the proceeding. A copy of the transcript may be purchased from the official court transcriber Lois Garrett at 517.676.5092. (RE: related document(s) <u>282</u> Transcript Request, <u>284</u> Transcript Request, <u>285</u> Transcript Request, <u>289</u> Transcript Request, <u>291</u> Transcript Request, <u>315</u> Transcript Request). Redaction Request Due By 08/30/2013. Redacted Transcript Submission Due By 09/6/2013. Transcript access will be restricted through 11/8/2013. (Garrett, Lois) (Entered: 08/09/2013)
08/29/2013	<u>685</u>	Transcript regarding Hearing Held 08/21/13 RE: HEARING RE. EMERGENCY MOTION FOR CLARIFICATION OF THE JULY 25, 2013, STAY ORDER; EXPEDITED HEARING RE. NOTICE OF PENDENCY OF DEFENDANT SYNCORA GUARANTEE, INC.'S, EMERGENCY MOTION TO DISSOLVE THE TEMPORARY RESTRAINING ORDER AND CONDUCT EXPEDITED DISCOVERY; STATUS HEARING RE. CORRECTED MOTION TO ASSUME LEASE OR EXECUTORY CONTRACT; ADVERSARY PROCEEDING 13-04942 - STATUS CONFERENCE RE. ORDER GRANTING IN PART AND DENYING IN PART DEBTOR'S EX PARTE MOTION FOR AN ORDER SHORTENING NOTICE, STAYING FURTHER BRIEFING AND SCHEDULING AN EXPEDITED HEARING WITH RESPECT TO MOTION OF DEBTOR CITY OF DETROIT TO SCHEDULE STATUS CONFERENCE, SET BRIEFING SCHEDULES AND MAINTAIN STATUS QUO. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 91 DAYS AFTER THE DATE OF FILING, TRANSCRIPT RELEASE DATE IS 11/29/2013. Until that time, the transcript may be viewed at the Clerk's Office by parties who do not receive electronic notice and participated in the proceeding. A copy of the transcript may be purchased from the official court transcriber Lois Garrett at 517.676.5092. (RE: related document(s) <u>570</u> Transcript Request, <u>620</u> Transcript Request, <u>634</u> Transcript Request, <u>638</u> Transcript Request, <u>648</u> Transcript Request, <u>649</u> Transcript Request, <u>661</u> Transcript Request). Redaction Request Due By 09/19/2013. Redacted Transcript Submission Due By 09/26/2013. Transcript access will be restricted through 11/29/2013. (Garrett, Lois) (Entered: 08/29/2013)
08/30/2013	<u>693</u>	Transcript regarding Hearing Held 08/28/13 RE: Opinion re. Stay Issue; Status Hearing re. Corrected Motion to Assume Lease or Executory Contract; Motion for Protective Order, Adversary Proceeding 13-04942 - Status Conference. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 91 DAYS AFTER THE DATE OF FILING, TRANSCRIPT RELEASE DATE IS 11/29/2013. Until that time,

			the transcript may be viewed at the Clerk's Office by parties who do not receive electronic notice and participated in the proceeding. A copy of the transcript may be purchased from the official court transcriber Lois Garrett at 517.676.5092. (RE: related document(s) <u>673</u> Transcript Request, <u>679</u> Transcript Request, <u>681</u> Transcript Request, <u>687</u> Transcript Request, <u>690</u> Transcript Request). Redaction Request Due By 09/20/2013. Redacted Transcript Submission Due By 09/27/2013. Transcript access will be restricted through 11/29/2013. (Garrett, Lois) (Entered: 08/30/2013)
11/19/2013		<u>1770</u>	Transcript regarding Hearing Held 11/14/13 RE: 2:36 p.m. Motion of the Objectors for Leave to Conduct Limited Discovery in Connection with Motion of the Debtor for a Final Order Pursuant to 11 U.S.C. Sec. 105, 362, 364(c)(1), 364(c)(2), 364(e), 364(f), 503, 507(a)(2), 904, 921 and 922 (I) Approving Post-Petition Financing, (II) Granting Liens and Providing Superpriority Claim Status and (III) Modifying Automatic Stay. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 91 DAYS AFTER THE DATE OF FILING, TRANSCRIPT RELEASE DATE IS 02/18/2014. Until that time, the transcript may be viewed at the Clerk's Office by parties who do not receive electronic notice and participated in the proceeding. A copy of the transcript may be purchased from the official court transcriber Lois Garrett at 517.676.5092. (RE: related document(s) <u>1732</u> Transcript Request, <u>1737</u> Transcript Request, <u>1738</u> Transcript Request, <u>1748</u> Transcript Request, <u>1752</u> Transcript Request, <u>1754</u> Transcript Request). Redaction Request Due By 12/10/2013. Redacted Transcript Submission Due By 12/17/2013. Transcript access will be restricted through 02/18/2014. (Garrett, Lois) (Entered: 11/19/2013)
11/28/2013		<u>1875</u>	Transcript regarding Hearing Held 11/27/13 RE: 11:19 a.m. – City of Detroit's Motion for Entry of an Order Establishing Pre-Trial and Trial Procedures and Setting Additional Hearings (Docket #1788). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 91 DAYS AFTER THE DATE OF FILING, TRANSCRIPT RELEASE DATE IS 02/27/2014. Until that time, the transcript may be viewed at the Clerk's Office by parties who do not receive electronic notice and participated in the proceeding. A copy of the transcript may be purchased from the official court transcriber Lois Garrett at 517.676.5092. (RE: related document(s) <u>1839</u> Transcript Request, <u>1841</u> Transcript Request, <u>1843</u> Transcript Request, <u>1848</u> Transcript Request). Redaction Request Due By 12/19/2013. Redacted Transcript Submission Due By 12/26/2013. Transcript access will be restricted through 02/27/2014. (Garrett, Lois) (Entered: 11/28/2013)
12/15/2013		<u>2132</u>	Transcript regarding Hearing Held 12/13/13 RE: Motion to Adjourn, Motion to Compel the Production of Privilege Log; Pretrial Conference. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 91 DAYS AFTER THE DATE OF FILING, TRANSCRIPT RELEASE DATE IS 03/17/2014. Until that time, the transcript may be viewed at the Clerk's Office by parties who do not receive electronic notice and participated in the proceeding. A copy of the transcript may be purchased from the official court transcriber Lois Garrett at 517.676.5092. (RE: related document(s) <u>2100</u> Transcript Request, <u>2106</u> Transcript Request, <u>2107</u> Transcript Request, <u>2114</u> Transcript Request, <u>2117</u> Transcript Request, <u>2125</u>

			Transcript Request, <u>2127</u> Transcript Request). Redaction Request Due By 01/6/2014. Redacted Transcript Submission Due By 01/13/2014. Transcript access will be restricted through 03/17/2014. (Garrett, Lois) (Entered: 12/15/2013)
12/20/2013		<u>2280</u>	<p>Transcript regarding Hearing Held 12/18/13 RE: IN RE: MOTION OF THE DEBTOR FOR A FINAL ORDER PURSUANT TO 11 USC SECTIONS 105, 362, 364(c)(1), 364(c)(2), 364(e), 364(f), 503, 507(a)(2), 904, 921, AND 922(I) APPROVING POST-PETITION FINANCING, (II) GRANTING LIENS AND PROVIDING SUPERPRIORITY CLAIMS STATUS AND (III) MODIFYING AUTOMATIC STAY (DKT #1520) MOTION OF THE DEBTOR FOR ENTRY OF AN ORDER (I) AUTHORIZING THE ASSUMPTION OF THAT CERTAIN FORBEARANCE AND OPTIONAL TERMINATION AGREEMENT PURSUANT TO SECTION 365(a) OF THE BANKRUPTCY CODE, (II) APPROVING SUCH AGREEMENT PURSUANT TO RULE 9019, AND (III) GRANTING RELATED RELIEF (DKT #17) CORRECTED MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING THE ASSUMPTION OF THAT CERTAIN FORBEARANCE AND OPTIONAL TERMINATION AGREEMENT PURSUANT TO SECTION 365(a) OF THE BANKRUPTCY CODE (II) APPROVING SUCH AGREEMENT PURSUANT TO RULE 9019, and (III) GRANTING RELATED RELIEF (Dkt #157). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 91 DAYS AFTER THE DATE OF FILING, TRANSCRIPT RELEASE DATE IS 03/21/2014. Until that time, the transcript may be viewed at the Clerk's Office by parties who do not receive electronic notice and participated in the proceeding. A copy of the transcript may be purchased from the official court transcriber Deborah Kremlick at 810.635.7084. (RE: related document(s) <u>2215</u> Transcript Request). Redaction Request Due By 01/10/2014. Redacted Transcript Submission Due By 01/17/2014. Transcript access will be restricted through 03/21/2014. (Kremlick, Deborah) (Entered: 12/20/2013)</p>

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846
MICHIGAN, .
 . Detroit, Michigan
 . August 2, 2013
Debtor. . 10:01 a.m.

HEARING RE. STATUS CONFERENCE
MOTION OF DEBTOR FOR ENTRY OF AN ORDER (I) AUTHORIZING THE
ASSUMPTION OF THE CERTAIN FORBEARANCE AND OPTIONAL
TERMINATION AGREEMENT PURSUANT TO SECTION 365(a) OF THE
BANKRUPTCY CODE, (II) APPROVING SUCH AGREEMENT PURSUANT TO
RULE 9019 AND (III) GRANTING RELATED RELIEF (DOCKET #17);
MOTION OF THE DEBTOR FOR ENTRY OF AN ORDER (A) DIRECTING AND
APPROVING FORM OF NOTICE OF COMMENCEMENT OF CASE AND MANNER
OF SERVICE AND PUBLICATION OF NOTICE AND (B) ESTABLISHING A
DEADLINE FOR OBJECTIONS TO ELIGIBILITY AND A SCHEDULE FOR
THEIR CONSIDERATION (DOCKET #18); MOTION OF DEBTOR FOR
ENTRY OF AN ORDER APPOINTMENT KURTZMAN CARSON CONSULTANTS,
LLC, AS CLAIMS AND NOTICING AGENT PURSUANT TO 28 U.S.C.,
SECTION 156(c), SECTION 105(a) OF THE BANKRUPTCY CODE AND
BANKRUPTCY RULE 2002 (DOCKET #19); AND MOTION OF DEBTOR,
PURSUANT TO SECTION 1102(a)(2) OF THE BANKRUPTCY CODE FOR
ENTRY OF AN ORDER DIRECTING THE APPOINTMENT OF A
COMMITTEE OF RETIRED EMPLOYEES
BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Jones Day
By: DAVID HEIMAN
HEATHER LENNOX
North Point
901 Lakeside Avenue
Cleveland, OH 44114-1190
(216) 586-3939

Jones Day
By: BRUCE BENNETT
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071-2300
(213) 243-2382

APPEARANCES (continued):

Jones Day
 By: GREGORY M. SHUMAKER
 51 Louisiana Avenue, N.W.
 Washington, DC 20001-2113
 (202) 879-3679

For Assured
 Guaranty Municipal
 Corp.: Winston & Strawn, LLP
 By: LAWRENCE A. LAROSE
 200 Park Avenue
 New York, NY 10166-4193
 (212) 294-3286

For AFSCME: Lowenstein Sandler, LLP
 By: SHARON L. LEVINE
 65 Livingston Avenue
 Roseland, NJ 07068
 (973) 597-2374

For Police and
 Fire Retirement
 System and
 General Retirement
 System of the City
 of Detroit: Clark Hill, PLC
 By: ROBERT GORDON
 151 South Old Woodward, Suite 200
 Birmingham, MI 48009
 (248) 988-5882

For the UAW: Cohen, Weiss & Simon, LLP
 By: BABETTE CECCOTTI
 330 West 42nd Street, 25th Floor
 New York, NY 10036
 (212) 356-0227

For National
 Public Finance
 Guarantee Corp.: Sidley Austin, LLP
 By: JEFFREY E. BJORK
 555 West 5th Street
 Los Angeles, CA 90013
 (213) 896-6037

For Public Safety
 Unions: Erman, Teicher, Miller, Zucker &
 Freedman, PC
 By: BARBARA PATEK
 400 Galleria Officentre, Suite 444
 Southfield, MI 48034
 (248) 827-4100

For Retired
 Detroit Police
 Members
 Association: Strobl & Sharp, PC
 By: LYNN M. BRIMER
 300 East Long Lake Road, Suite 200
 Bloomfield Hills, MI 48304
 (248) 540-2300

APPEARANCES (continued):

For David Sole:	Jerome D. Goldberg, PLLC By: JEROME GOLDBERG 2921 East Jefferson, Suite 205 Detroit, MI 48207 (313) 393-6001
For Retired Detroit Police and Fire Fighters Association and Detroit Retired City Employees Association:	Silverman & Morris, PLLC By: THOMAS R. MORRIS 30500 Northwestern Highway, Suite 200 Farmington Hills, MI 48334 (248) 539-1330
For Syncora Guarantee and Syncora Capital Assurance:	Kirkland & Ellis, LLP By: STEPHEN HACKNEY 300 North LaSalle Chicago, IL 60654 (312) 862-2074
For Daniel McDermott:	Office of the United States Trustee By: MARIA GIANNIRAKIS 201 Superior Avenue, Room 441 Cleveland, OH 44114 (216) 522-7800
For Michael Karwoski:	MICHAEL J. KARWOSKI In pro per 26015 Felicity Lndg. Harrison Township, MI 48045 (313) 378-7642
For Dennis Taubitz:	DENNIS TAUBITZ In pro per
For Erste Europaische Pfandbrief-und Kommunkreditbank Aktiengesellschaft in Luxemburg, S.A.:	Ballard Spahr, LLP By: VINCENT J. MARRIOTT, III 1735 Market Street, 51st Floor Philadelphia, PA 19103-7599 (215) 864-8236
For Financial Guaranty Insurance Company:	Weil, Gotshal & Manges, LLP By: ALFREDO PEREZ 700 Louisiana, Suite 1600 Houston, TX 77002 (713) 546-5040

APPEARANCES (continued):

For U.S. Bank: McDermott, Will & Emery, LLP
By: WILLIAM P. SMITH
227 West Monroe Street, Suite 4700
Chicago, IL 60606
(312) 372-2000

Court Recorder: Jane Murphy
United States Bankruptcy Court
211 West Fort Street
21st Floor
Detroit, MI 48226-3211
(313) 234-0068

Transcribed By: Lois Garrett
1290 West Barnes Road
Leslie, MI 49251
(517) 676-5092

Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

1 THE CLERK: All rise. Court is in session. Please
2 be seated. Case Number 13-53846, City of Detroit, Michigan.

3 THE COURT: Good morning, everyone.

4 ATTORNEYS: Good morning, your Honor (collectively).

5 THE COURT: We are going to begin as we did the last
6 time with the admission of an attorney to the Bar of the
7 Court. Who would like to be admitted? Step forward, please.

8 MR. ROSSMAN: Good morning, your Honor. Jeff
9 Rossman.

10 THE COURT: Mr. Rossman, are you prepared to take
11 the oath of admission to the Bar of the Court?

12 MR. ROSSMAN: Yes, I am.

13 THE COURT: Please raise your right hand --

14 MR. ROSSMAN: Sorry.

15 THE COURT: -- carefully. Do you affirm that you
16 will conduct yourself as an attorney and counselor of this
17 Court with integrity and respect for the law, that you have
18 read and will abide by the civility principles approved by
19 the Court, and that you will support and defend the
20 Constitution and laws of the United States?

21 MR. ROSSMAN: I do.

22 THE COURT: Welcome, sir.

23 MR. ROSSMAN: Thank you, your Honor.

24 THE COURT: Before we begin our status conference
25 today, I need to remind everyone of the rules for the use of

1 cellular phones in the courthouse and the rules for those
2 listening to these proceedings through CourtCall. District
3 Court Local Rule 83.31(f) governs the use of cellular phones
4 and other communication devices. An attorney appearing in
5 connection with any judicial proceeding may bring a phone
6 into our federal court facility. However, the phone cannot
7 be used at all while in a courtroom. In other words,
8 texting, talking on the phone, recording, or taking pictures
9 of the proceedings is not permitted in the courtroom.
10 Attorneys may use cellphones in the approved attorney
11 conference room on the second floor of this building.

12 Now let me address the use of CourtCall to listen in
13 on these proceedings. Its use is restricted to attorneys and
14 their clients who are parties in this case. CourtCall is not
15 to be used or accessed by the media or the public. The law
16 prohibits the simultaneous public broadcast of court
17 proceedings. The Court expects that, as officers of the
18 court, attorneys will respect this restriction. The Court
19 understands that this is an important and valuable service,
20 but it can only continue to make this service available if
21 this restriction is observed. The audio recording of all
22 court hearings will be posted on the court's website very
23 shortly after the hearings are concluded and will in that way
24 be available to the media and the public without charge.

25 Okay. So now turning to our status conference, I'm

1 going to shuffle the order of the agenda just a little bit.
2 I've decided to do the review by me of the Court's limited
3 role in Chapter 9 cases first, and then we'll do the items --
4 the rest of the items on the status conference agenda pretty
5 much in the order stated, and then, of course, we will
6 consider the motions that are on the calendar for today.

7 It is important for the parties and the public to
8 understand the very limited role that a Bankruptcy Court and
9 a bankruptcy judge play in a municipal bankruptcy case under
10 Chapter 9 of the Bankruptcy Code. Let me first try to
11 describe what that role is and then discuss what that role is
12 not. Primarily, the Court's role in this case is to resolve
13 the legal issues that the parties raise as the city moves
14 through this Chapter 9 process. In general, there are two
15 main challenges that we can readily expect the city to face
16 in this case. The first is to establish that it is eligible
17 for Chapter 9 relief. If it meets that challenge, then its
18 next challenge is to establish that its plan to adjust its
19 debts meets the requirements for confirmation under Chapter 9
20 of the Bankruptcy Code.

21 Beyond those two major issues, the parties may
22 present other issues to the Court during the case. These may
23 involve whether to approve the city's assumption or rejection
24 of its contracts, including its union contracts; whether to
25 grant creditors relief from the stay against litigation that

1 the Court and the law have imposed; whether to approve of
2 certain settlements; whether to approve of certain kinds of
3 proposed borrowings; and, finally, what dates and deadlines
4 to set as we move the case to its conclusion, whatever that
5 conclusion might be.

6 In addition, the Court sees three other roles for
7 it. The first is to facilitate, to the greatest extent
8 possible, the consensual resolution of disputes. To that
9 end, I have proposed a process of mediation, which I will
10 discuss with counsel later. The second is to apply
11 procedures of judicial management in this case that will meet
12 the requirement to -- of Rule 1 of the Federal Rules of Civil
13 Procedure for the just, speedy, and inexpensive determination
14 of this case. The circumstances of this case make that
15 requirement imperative and one that the Court intends to
16 fulfill with the highest degree of commitment, but the Court,
17 of course, cannot do this alone. In fulfilling this
18 commitment, the Court requests input from the attorneys as
19 well as their full cooperation and, indeed, their
20 partnership. In a few minutes, the attorneys and I will
21 discuss what dates and deadlines should be set in this case
22 so that we can meet the requirement for the just, speedy, and
23 inexpensive determination of this case.

24 The third additional role for the Court is to
25 recognize and appreciate the enormous public interest in this

1 case and to facilitate, to the greatest extent possible,
2 public access to the Court's proceedings. However, there are
3 certain restrictions that the Court must ask the public and
4 the media to accept. Some of these restrictions are imposed
5 by law. For example, as I said before, the law prohibits the
6 simultaneous broadcast of federal court proceedings. Other
7 restrictions result from security concerns, and we request
8 your patience in our security screening process as this helps
9 to protect all of us. Other restrictions will have to be
10 imposed just to allow the process to function properly. For
11 example, when and if disputes are submitted to mediation,
12 that process must be both closed to the public and completely
13 confidential in order for it to have any chance of success.
14 Finally, there are simple practical limitations, so, for
15 example, we only have so much space available in this
16 courtroom and for overflow courtroom viewing.

17 Now let me address what the Court's role is not and
18 what the Court will not do. In this Chapter 9 case, as in
19 all others, the city's elected and appointed officials and
20 officers remain in full control of the city and its
21 operations. Whatever their responsibilities for running the
22 city before the case was filed, they still are. As a result,
23 the Court has no role to play in managing or running the city
24 or any of the services it provides. Any compliments,
25 complaints, suggestions, or requests regarding city services

1 should continue to be directed to the city. There is nothing
2 the Court can do about any of those matters. The Court does
3 not displace city government in any respect, and nothing in
4 Chapter 9 gives the Court any authority to hire, fire, or
5 supervise anyone in city government. The city's officials
6 are not accountable to this Court for how they run the city.

7 There is a second way in which it is important to
8 understand the limited role of the Court in this case.
9 Chapter 9 of the Bankruptcy Code states that it is the city's
10 responsibility to propose and file a plan. The Court's role
11 is only to determine whether the plan that the city proposes
12 meets the requirements of Chapter 9. It is not the Court's
13 role to dictate to the city what its plan should state or
14 even to suggest anything about it. That is entirely for the
15 city to decide after, of course, discussing and attempting to
16 negotiate the plan with its creditors.

17 Any questions about what the Court's role is or is
18 not? Okay. So let's now then move on to the next item on
19 our status conference agenda. I'll ask the representatives
20 of the city to address the Court regarding the status of the
21 filing of the list of creditors under Section 924 and any
22 potential amendments. Sir.

23 MR. HEIMAN: Good morning, your Honor. David Heiman
24 from Jones Day on behalf of the city. I hope the microphone
25 is working properly after the attack on it, but what -- and

1 thank you for those comments. They're very helpful, indeed,
2 especially about the plan process and understanding that you
3 have proposed a plan deadline -- a plan filing deadline,
4 which I will address in a few minutes. As you have
5 suggested, I will take these one at a time. I assume that
6 you will want to hear from others, to the extent they wish to
7 be heard.

8 THE COURT: Yeah. At this point I just need the
9 record to state the city's compliance with the filing of the
10 list of creditors and if you intend or foresee any amendments
11 to it.

12 MR. HEIMAN: Well, we did, I'm happy to say, file
13 the list of creditors last night, so that's the easy part. I
14 cannot speak really -- it's 3,500 pages, so I cannot speak to
15 whether there are amendments. Actually, this list itself was
16 an amendment for changing of addresses and the like --

17 THE COURT: Um-hmm.

18 MR. HEIMAN: -- and so I hope it's complete, but we
19 may find during the course of the case that we will
20 supplement it, so I don't --

21 THE COURT: Okay. My only encouragement to you
22 would be that if you determine a need to amend that list, you
23 do so promptly.

24 MR. HEIMAN: Thank you, your Honor. We will do
25 that.

1 THE COURT: So the next item is the disclosure by
2 the city of the status of its negotiations with creditors.

3 MR. HEIMAN: Yes, your Honor. That might take a few
4 more minutes than the last item.

5 THE COURT: Um-hmm, yes.

6 MR. HEIMAN: I'd first like to say we all know that
7 we are in a very serious situation here, so rather than drag
8 everybody through the blow-by-blow of how we got to our
9 proposal and so forth, I'd like to just refer the Court and
10 others to the Orr declaration that --

11 THE COURT: Um-hmm.

12 MR. HEIMAN: -- I think does that in great detail at
13 pages 52 to 73. I would like to say that there was a
14 significant effort that went into preparing that, and that
15 was followed up by meetings, many meetings with creditors,
16 informational and issue-oriented meetings. The proposal we
17 made, as your Honor knows, was 128 pages. It was made public
18 on the city website for all to see, and from our standpoint
19 we feel we've done our best to basically lay open the
20 relevant aspects of the city's finances to everyone, most
21 particularly to our creditors. In that presentation, we --

22 THE COURT: I have to interrupt you. I don't intend
23 this to be your opening statement on the issue of whether
24 your client has negotiated in good faith because that's an
25 eligibility issue. What I really want to hear is what the

1 current status is and what negotiations, if any, have taken
2 place since the case was filed.

3 MR. HEIMAN: Yes, your Honor. We have had
4 discussions in the last week and have discussions even
5 scheduled today --

6 THE COURT: Um-hmm.

7 MR. HEIMAN: -- and next week, so discussions are
8 continuing. However, in terms of the status of discussions,
9 it's clear that there are significant differences between the
10 city and its unsecured creditors distinguished from its
11 secured creditors.

12 THE COURT: Um-hmm.

13 MR. HEIMAN: Those differences are not surprising
14 based on the limited resources that the city has available,
15 so in our book -- and that's what I was getting to -- there
16 was a proposal made, so our proposal is out on the table. I
17 don't mean this in terms of eligibility, and I certainly
18 don't want to characterize any creditor positions here.
19 That's not my objective. What I'd like to say is of course
20 we are continuing to talk. We will hopefully continue to
21 talk virtually every day as we get through this case or
22 attempt to get through this case, but there are significant
23 differences that we feel are going to be difficult to bridge.
24 We believe those differences, again, are based on our limited
25 resources to pay our creditors and their perspective on their

1 own positions and rights with respect to their claims, and
2 so --

3 THE COURT: How would you -- how would you
4 characterize your client's willingness to continue to try,
5 however, to bridge those differences?

6 MR. HEIMAN: I would say more than a willingness,
7 your Honor, there is a commitment not only by Kevyn Orr and
8 other people in the city but by his team of professionals to
9 make itself available and, in fact, pursue discussions, as I
10 say, every day of the week that we can with every
11 constituency. And I would also like to add I don't want to
12 mislead anybody. I believe that we've had constructive
13 discussions and -- civil and friendly, and yet when it comes
14 to the point of saying, "How do you view our proposal?" no
15 one likes it, and that's not surprising. It requires
16 significant -- our proposal requires significant across-the-
17 board debt relief from our unsecured creditor body. So that
18 is where we are, and if I may, I know this is another agenda
19 item, but we welcome the idea of mediation because there are
20 very serious issues here. We have, as I say, limitations,
21 and, again, we would like to talk to creditors consistently,
22 constantly. We have meetings scheduled even today and
23 several meetings scheduled next week, and we will continue to
24 schedule meetings, but the --

25 THE COURT: All right. Well, you know, I'll

1 certainly submit -- request your more specific comments
2 regarding mediation as well as those of others when we get to
3 that item on the agenda.

4 MR. HEIMAN: Okay. Thank you, your Honor.

5 THE COURT: Let's turn our attention to the proposed
6 dates and deadlines item on the agenda, and I want to focus
7 first on the schedule for resolution of the issue of
8 eligibility. Before we set dates and deadlines and the
9 extent of discovery, however, it would be helpful for me to
10 get whatever sense I can from the attorneys involved as to
11 what the eligibility issues will be, and so from the papers
12 that have been filed so far, I think we can safely assume
13 that there will be at least these two: one, did the city
14 negotiate in good faith; and, two, did the governor properly
15 authorize the Chapter 9 filing in light of what is argued to
16 be the constitutional protection of pension rights. Do you
17 or does anyone here see any other eligibility issues?

18 MR. HEIMAN: I think, your Honor, first of all, let
19 me say that Mr. Bennett is going to address the motion that
20 requests the eligibility schedule as well as your proposed --

21 THE COURT: Okay.

22 MR. HEIMAN: -- deadlines, so he may have more to
23 say about this, but we believe that the statutory
24 requirements for filing are going to be at issue, and, of
25 course, we have our position on that. And also we understand

1 the governor's authority issue, especially after the last
2 couple of weeks, so we are aware of that, but Mr. Bennett may
3 have more to say about that at the time we get to the motion.
4 Okay.

5 THE COURT: Okay. So let me ask any other counsel,
6 can any of you foresee any other eligibility issues?

7 MR. LAROSE: Good morning, your Honor. Lawrence
8 Larose representing Assured Municipal Finance Guaranty
9 Corporation, insurer of approximately \$2.5 billion of various
10 series of the city's indebtedness.

11 Your Honor, with respect to authorization -- we have
12 made no decision as to objecting to eligibility, but with
13 respect to authorization, your Honor, I respectfully suggest
14 that it goes beyond the issue of pensions.

15 THE COURT: In what sense, sir?

16 MR. LAROSE: Compliance with the underlying Act in
17 connection with the authorization of the Chapter 9.

18 THE COURT: Can you be more specific?

19 MR. LAROSE: No. As I said, your Honor, I'm not
20 prepared to make an objection today on that issue. I just
21 need to preserve it for the record.

22 THE COURT: Okay.

23 MR. LAROSE: Thank you.

24 THE COURT: Well, I don't want anyone to think that
25 they need to address me at the microphone to preserve

1 anything for the record. You will be given an opportunity to
2 object. That will be your deadline to state your eligibility
3 objections.

4 MR. LAROSE: Thank you, your Honor.

5 THE COURT: So we don't need that parade.

6 MS. LEVINE: Your Honor, I rose before, so I
7 don't -- Sharon Levine, Lowenstein Sandler. We really were
8 concerned that there might be a limitation on some of the
9 reservations. We gave the Court a preview in the brief in
10 support of 105, and we don't need to burden the record today.

11 THE COURT: Okay. All right. Mr. Gordon.

12 MR. GORDON: Thank you, your Honor. Robert Gordon
13 on behalf of the Detroit Retirement Systems. At the risk of
14 not answering the question that you just asked, I just want
15 to make sure from a procedural standpoint whether we're going
16 to be able to go back to other questions that you've asked of
17 Mr. Heiman that we might want to respond to, such as the
18 status of negotiations. I didn't know if you wanted to hear
19 from parties after you've gone through the list or whether we
20 can weigh in on those issues for the Court at this time.

21 THE COURT: I don't really feel the need to have
22 everyone respond to that. What I wanted from that was what I
23 got, which was the city is willing to negotiate.

24 MR. GORDON: And I'm certainly not here to get into
25 a polemic about it, but I wanted to make sure the Court was

1 aware of the status in a little more detail at the right time
2 because obviously one of the things that the Court is
3 considering is mediation, and I would like to have the
4 opportunity to at least apprise the Court of why the
5 discussions are where they are at this point with parties and
6 why perhaps mediation may not be appropriate just yet, so --

7 THE COURT: Okay. Let's save that for --

8 MR. GORDON: Okay.

9 THE COURT: -- that agenda item then.

10 MR. GORDON: Thank you, your Honor.

11 THE COURT: And I will want to hear from you then
12 regarding that.

13 MR. GORDON: Thank you, your Honor.

14 THE COURT: Any other thoughts -- go ahead, sir --
15 on what issues may arise in the context of eligibility?

16 MR. BENNETT: I'm Bruce Bennett from Jones Day, your
17 Honor, and I have responsibility for the eligibility side of
18 this today.

19 THE COURT: Okay.

20 MR. BENNETT: My reading of the situation in terms
21 of where the expected objections are is the same as yours
22 from the pleadings that have been filed. We certainly expect
23 the objection relating to the constitutionality of the
24 statute, and we certainly expect the objection relating to
25 good faith. I'm not aware of the objection Mr. Larose is

1 foreshadowing. One of the reasons for an early deadline for
2 exclusivity objections, which will hopefully be -- I think we
3 expect them to be genuine substantive objections -- is that
4 it will help every subsequent step in the process if we have
5 a clear and complete statement of what the objections are as
6 rapidly as possible.

7 THE COURT: Okay.

8 MR. BENNETT: On the schedule in particular, the
9 schedule is fine with us. I can report -- I want to report
10 two things. There were really two objections to the whole
11 scheduling process that were actually filed. One was did we
12 really need to receive e-mail service of objections or would
13 we just take them off ECF.

14 THE COURT: Hold on that one. We'll get to that
15 later.

16 MR. BENNETT: Okay.

17 THE COURT: Right now I just want to talk about
18 dates and deadlines.

19 MR. BENNETT: Okay. The only comment I'll talk
20 about dates and deadlines is that we -- in private
21 discussions, there is one party that has what I think are
22 genuine special circumstances affecting their ability to
23 comply with the August 19th and 23rd dates, and under the
24 assumption that these dates stay the way they are, we've
25 reached a separate accommodation that would work for the

1 debtor and for that party, and I guess I just wanted to make
2 clear that -- or ask, your Honor, that when you did set
3 deadlines, was it possible to make those kinds of informal
4 adjustments where two sides thought they were appropriate
5 without offending the overall schedule?

6 THE COURT: Well, the answer is most likely yes so
7 long as it doesn't result in the delay of the hearing itself.

8 MR. BENNETT: And this one doesn't, and I think
9 that's an appropriate guideline, and we will govern ourselves
10 by that.

11 THE COURT: Okay. Fair enough. If those are the
12 two primary issues -- and I recognize that there may be
13 others that parties may assert in the meantime -- I have to
14 ask with all sincerity, because you all know this case better
15 than I do, what is the need for discovery, and what is the
16 scope of the discovery that is needed? Now, let me, before
17 you all answer that question, give you my uninformed
18 analysis, admittedly uninformed analysis.

19 On the issue of whether the governor's authorization
20 was proper, it strikes me that that is entirely a legal
21 issue, and if anyone believes otherwise, I'd obviously be
22 interested in hearing that, but I think we can all agree that
23 the governor's authorization did not include a restriction on
24 the city's ability to seek an impairment of pension rights,
25 which is the fact that raises the issue.

1 Turning to the good faith negotiation issue, I have
2 a sense -- and I could be wrong -- that anyone who might
3 object on that ground has already firsthand knowledge of what
4 the negotiations were or weren't, so, again, I would ask from
5 a totally uninformed perspective what the need for discovery
6 is. I ask this question because if there's not a need for
7 discovery, we're going to have to think about even advancing
8 eligibility from where I have tentatively suggested it.

9 MR. BENNETT: Your Honor, since we would concur with
10 your assessment, I'll cede the podium to others for now.

11 THE COURT: Okay.

12 MS. CECCOTTI: Your Honor, I didn't mean to send Mr.
13 Bennett away prematurely, but I wasn't clear exactly when you
14 wanted us --

15 THE COURT: Now.

16 MS. CECCOTTI: -- to rise.

17 THE COURT: Please.

18 MS. CECCOTTI: Okay. Well, speaking for the UAW, I
19 think what we have in the record certainly on the
20 bankruptcy -- from the city's filings we have some, you know,
21 documents that were filed in terms of their qualification
22 statement, in terms of a memorandum of law, various
23 declarations. I don't know that -- certainly for the UAW I
24 don't think -- I wouldn't want the Court to think that we've
25 scratched the surface in trying to unpack those and determine

1 to what extent any discovery is needed, so I would caution
2 against perhaps assuming more than the parties or at least
3 certainly we have had an opportunity to do. We expected to
4 discuss with the Court, as we're doing today, a schedule for
5 eligibility but not in the context of -- or not informed by
6 anything other than an initial look at the papers that have
7 been filed, so while it may be true that some or more of us
8 were present at certain meetings, looking at the totality of
9 what the city has filed, I think we would really need to take
10 a harder look at that before we could say with any certainty
11 that no discovery is needed really on any of the
12 qualifications. So I realize that that is a rather general
13 statement, but I would not want the Court to be misled in
14 thinking that we are prepared certainly today with a, you
15 know, sort of fully indexed and annotated view of the papers
16 that the city has filed and a sort of plan of how to get
17 to -- from those papers to a position that we might take let
18 alone to a litigation schedule position.

19 MS. LEVINE: Your Honor, for the record, Sharon
20 Levine, Lowenstein Sandler. We would concur that the extent
21 of discovery that we would need has not yet fully availed
22 itself to us, but, at a minimum, to the extent that the city
23 intends to rely on declarations to offer evidence in support
24 of eligibility, we would want to take a close look at that
25 evidence and probably seek documents and depositions with

1 regard to those proposed witnesses.

2 In addition to that, one of the things that's
3 probably going to come to light as we move forward in this
4 process, your Honor, is there may be a definitional issue and
5 a dispute with regard to what exactly constitutes
6 negotiations because our view is that the meetings that have
7 taken place to date have been more presentations without an
8 opportunity for give and take. And in addition to that, your
9 Honor, in reviewing the information that's in the data room,
10 there's information that we would need even to evaluate just
11 those presentations that's not yet in the data room, so if a
12 negotiation over this kind of an economic situation goes as
13 we've seen others go, the first step of the negotiation
14 process is the diligence, so, you know, we appreciate the
15 fact that the city has populated a data room. There's always
16 stuff that has to get added to it and/or created. We haven't
17 seen the soft model, if you will, of the debtor's business
18 plan. And after that then there is the dispute that you have
19 to work through with regard to what the assumptions are that
20 underlie that business plan before you can get to whether or
21 not the asks and the gives are appropriate or not
22 appropriate, and we would respectfully submit that in
23 addition to just the litigation aspect of the trial on
24 eligibility, there may be a second silo of discovery that has
25 to do with legitimate diligence requests in connection with

1 facilitating better and more meaningful negotiations or
2 exchanges of information perhaps facilitated by the mediator
3 who may be helping us with process as well as substance in
4 order to get through this process constructively. Thank you.

5 THE COURT: Thank you. That is a very helpful
6 comment to make. Everyone in this room who has been in more
7 than one bankruptcy case knows that there's very little about
8 a debtor that's irrelevant to the bankruptcy case and very
9 few requests that creditors make for information that is
10 burdensome, and I am sure the city and its counsel understand
11 that and will act accordingly.

12 MR. BJORK: Good morning, your Honor. Jeff Bjork
13 from Sidley Austin on behalf of National Public Finance
14 Guarantee. National insures about 2.5 billion of the city's
15 debt obligations. I just want to echo the comments of
16 counsel. We have been exchanging information requests with
17 the city. We've been in major discussions with them about
18 information we need, some of which actually goes to issues
19 that may be pertinent to eligibility, some of which goes to
20 issues that are beyond the scope of eligibility. While those
21 discussions are continuing, what we had talked with Mr.
22 Bennett about was potentially allowing us to participate in
23 the discovery with eligibility because we think on the
24 schedule it's tight. We support the schedule. We also think
25 it might be the most efficient way to get the information

1 that, from our perspective, will help us better understand
2 where this restructuring is going and, to your Honor's point
3 about appointing a mediator, I think better inform the
4 parties quicker on -- sooner in terms of where that mediation
5 may be going. So just on that, what we had proposed, just
6 one change in the schedule would be that the pretrial brief
7 that you've set forth in terms of timing actually be the
8 substantive objection that would be tied to any evidence that
9 was intended to be presented at trial based upon the
10 discovery policies itself.

11 THE COURT: I'm not sure I followed you. What is
12 your request?

13 MR. BJORK: My request, your Honor, would be that
14 the August 19th deadline --

15 THE COURT: Yes.

16 MR. BJORK: -- they have proposed that it be
17 objections tied to specific facts. Our proposal is that we
18 could participate in the eligibility based -- eligibility
19 discovery based upon a reservation of rights to the extent we
20 think that there are issues with an objection to the extent
21 necessary based upon the facts to be determined through
22 discovery supplemented and filed as part of the pretrial
23 brief, so rather than -- so essentially, your Honor, what you
24 end up with is one objection tied to the record as opposed to
25 objection, discovery, and then a supplemental objection.

1 THE COURT: That makes me nervous, uneasy, because
2 if I hear you right, what you're saying is you want to do
3 discovery first and then decide whether and to what extent to
4 object to eligibility?

5 MR. BJORK: We want to make a fully informed
6 decision based upon the discovery that we determined and
7 received from the city as to whether there is any grounds to
8 object to eligibility, yes.

9 THE COURT: That's -- sir.

10 MR. BENNETT: We are uncomfortable as well. I think
11 that there was a number of things said. There's a lot of
12 information about the city that's already available, and we
13 log each and every request, and we respond to requests as we
14 can, and if there are disputes about that, we can deal with
15 it, but given that there's so much information available, it
16 kind of is hard for us to understand how it is that one would
17 not know the grounds on which they are objecting to
18 eligibility at this time. We fully understand that facts
19 currently unknown could conceivably surface later, and we
20 would certainly not object if a fact unknown today found its
21 way into a subsequent brief, but we think the August 19th
22 deadline should require and call for an objection -- all
23 grounds stated and facts then known that support the
24 objection. And that's the way to narrow disputes and to have
25 an economical piece of litigation going forward. Short of

1 that, it could be a wide-ranging procedural disaster that
2 would be ridiculously expensive and we think should be
3 avoided.

4 THE COURT: I agree, counsel. There certainly are
5 circumstances in which the law permits amendments to
6 pleadings. They are limited. They apply here, but as a
7 general matter, the Court wants to set a firm deadline for
8 the filing of objections to eligibility.

9 MR. BENNETT: Understood. Thank you, your Honor.

10 THE COURT: Mr. Gordon.

11 MR. GORDON: Thank you, your Honor. Again, Robert
12 Gordon on behalf of the Detroit Retirement Systems. I will
13 focus just on the 109(c)(2) issue for a moment because Ms.
14 Levine already commented on the 109(c)(5) issue of good faith
15 and what have you. As to the 109(c)(2) issue, I certainly,
16 in all candor, agree with the Court that it could appear that
17 it is strictly a legal issue. To that end and consistent
18 with the comments I've just heard, it would seem to us -- and
19 this is something that is consistent with what we filed
20 yesterday afternoon -- that in addition to a deadline for the
21 filing of an eligibility objection, there ought to be a
22 deadline for the city to then file some kind of a response,
23 and then we could see if there is any kind of a discovery
24 issue that needs to be addressed.

25 THE COURT: Um-hmm, um-hmm, yeah.

1 MR. GORDON: So that's my suggestion --

2 THE COURT: I saw that you submitted that, and that
3 was not in there, not by intent. It just didn't occur to me
4 to put that in there, so I would like to hear from the city
5 regarding that question. Thank you.

6 MR. GORDON: Thank you, your Honor.

7 THE COURT: So the question is should we have a
8 deadline for the city to file a written response or a series
9 of written responses to the eligibility objections that are
10 filed?

11 MR. BENNETT: I certainly don't have a problem
12 filing any pleading that the Court thinks would be helpful to
13 it.

14 THE COURT: Um-hmm.

15 MR. BENNETT: I do think it's important to note --
16 and I hope people didn't miss it in the flurry of filings --
17 that we had filed a statement of qualifications and a fairly
18 extensive --

19 THE COURT: Um-hmm.

20 MR. BENNETT: -- brief on the subject of eligibility
21 already --

22 THE COURT: Um-hmm.

23 MR. BENNETT: -- so it's not as if our position is a
24 mystery.

25 THE COURT: Um-hmm. All right. I want to give

1 serious consideration to this and see how it can be worked
2 into the schedule. Okay. But to refocus us here, the
3 question is what about discovery on the issue of eligibility?

4 MS. PATEK: Your Honor, Barbara Patek appearing on
5 behalf of the public safety unions. I would echo Ms.
6 Levine's comments with respect to the definitional question
7 on negotiation. We concur with the deadline. We think this
8 is an aggressive and tight scheduling order as it stands now.
9 We're prepared to abide by it subject to -- you know, for
10 good cause shown, and it sounds like the debtor has already
11 acknowledged and agreed to that with one other party, so with
12 that caveat --

13 THE COURT: Um-hmm.

14 MS. PATEK: -- and the issue of the city's response
15 being considered, we're prepared to go forward.

16 THE COURT: Um-hmm. Anyone else? Okay.

17 MR. BENNETT: On the subject of good faith, I agree
18 with your Honor that it doesn't take a great deal of
19 exploration to figure out whether the parties did or did not
20 act in good faith, and I would, frankly, think that
21 there's --

22 THE COURT: Well, whether the city negotiated in
23 good faith.

24 MR. BENNETT: Well, that's true; however, if your
25 Honor reads the cases, you'll find that the emphasis quickly

1 shifts to what both sides were doing because it takes --

2 THE COURT: Fair enough, but the eligibility
3 requirement --

4 MR. BENNETT: Okay. And so --

5 THE COURT: -- is the city.

6 MR. BENNETT: -- just to lay out very briefly, Mr.
7 Heiman, I think quite properly -- I'm going to do the same
8 thing. We're very reluctant to say what our negotiating
9 partners said to us. We feel comfortable telling you
10 everything about what we said, and, frankly, much of what we
11 have said is public. It's the other side that your Honor
12 does not know about and has to find out about on some basis
13 to make an assessment.

14 THE COURT: Fair enough.

15 MR. BENNETT: And I am submitting that, in fact, if
16 you had before you what the city proposed and what the
17 responses were and were there responses in all circumstances
18 in the negotiating period that we tried hard to make
19 productive, I think you would, frankly, have all you need, so
20 I do think that in the context of parties who are going to
21 object to good faith of the city in the negotiating process,
22 you need some form of an arrangement, I think, to benefit
23 your decision-making to find out exactly what that party said
24 in response to the city's very public proposal.

25 THE COURT: Okay.

1 MR. BENNETT: Thank you.

2 THE COURT: Ms. Brimer. One second, sir. Mr.
3 Morris, I do want to hear from you, so stand by.

4 MR. MORRIS: All right. I was told I need to get
5 the --

6 MS. BRIMER: Good morning, your Honor. Lynn M.
7 Brimer appearing on the Retired Detroit Police Members
8 Association. It is an association of approximately 240
9 retired Detroit Police Department personnel who either are
10 currently or will in the future collect pursuant to the
11 police and fire-fighters pension.

12 I raise one issue with respect to the Court's
13 deadlines and the comments this morning, and that is up later
14 this morning, your Honor, is an issue with respect to whether
15 or not a committee will be appointed to represent the
16 retirees. And there are many issues that we have with
17 respect to that motion, but with respect to the Court's
18 deadlines, the concern I raise right now and just want to be
19 sure the Court is cognizant of this is that if there is -- if
20 the Court does determine that --

21 THE COURT: Um-hmm.

22 MS. BRIMER: -- it is appropriate and within the
23 authority of the Code for the trustee to appoint a committee,
24 these deadlines may be extremely aggressive because it's very
25 possible that a committee would not be constituted, and

1 counsel and what other -- whatever other professionals would
2 be required would not even be in place by this deadline, so I
3 just --

4 THE COURT: Um-hmm.

5 MS. BRIMER: -- would like to ensure that the Court
6 keep that in mind when evaluating the deadlines.

7 THE COURT: Right. I do want to be very sensitive
8 to that issue and build into our process an adequate
9 opportunity for everyone to be heard, of course.

10 MS. BRIMER: Thank you, your Honor.

11 THE COURT: Thank you. Sir. And then I'll hear Mr.
12 Morris next.

13 MR. GOLDBERG: Okay. I just have a brief question,
14 your Honor. My name is Jerome Goldberg, and I'm on --

15 THE COURT: Mr. Morris, there's a seat for you here.
16 Go ahead, sir.

17 MR. GOLDBERG: And I represent party of interest
18 David Sole. I just had a brief question, and I excuse the
19 Court for my own ignorance in the procedures in this matter,
20 but the deadline to serve written discovery requests for
21 August 23rd, just for my own clarification, that specifically
22 is discovery requests relative to the eligibility question;
23 is that correct?

24 THE COURT: Yes. All of this discovery is the
25 discovery needed for the eligibility issues that are raised

1 in the objections.

2 MR. GOLDBERG: Thank you, your Honor.

3 THE COURT: Mr. Morris.

4 MR. MORRIS: Your Honor, Ms. Brimer made my point.

5 THE COURT: Oh, okay. Then you're all set. Would
6 anyone else like to be heard on this issue of the necessary
7 discovery? All right. I will take your comments under
8 advisement and issue an appropriate scheduling order. There
9 are other deadlines. We've been talking about deadlines
10 regarding eligibility. I suggested that we might want to
11 have a deadline for the city to file motions to assume or
12 reject executory contracts, including collective bargaining
13 agreements. Sir.

14 MR. HEIMAN: Yes. Thank you, your Honor. I think I
15 can address that pretty quickly. Most of our collective
16 bargaining agreements have expired, the large majority. We
17 have six or seven still remaining in connection with the work
18 at Detroit Water and Sewer District. It is our view at this
19 point that we will not seek -- we will not need to seek court
20 relief on those --

21 THE COURT: Um-hmm.

22 MR. HEIMAN: -- and we will advise you at our
23 earliest opportunity if that should change.

24 THE COURT: Okay. What about other kinds of
25 executory contracts, leases, et cetera, et cetera?

1 MR. HEIMAN: We have nothing on tap today for that
2 in terms of deadlines. As your Honor may know, we have a
3 list of noncore assets that we're dealing with. They include
4 water and sewer and the Coleman Young Airport, et cetera, et
5 cetera, the Institute of Art. There is a list in our book
6 and our -- and a description about them, and we hope on some
7 of them, at least, to be able to bring something to your
8 Honor that will be beneficial to the estate. We are not
9 anywhere near prepared to do that today, so I don't think we
10 have anything today specifically in that area.

11 There is one that comes to my mind. There is one
12 issue right now, and I'm reluctant to raise it slightly, but
13 I feel I have to so that there's no question of the city
14 somehow waiving a right to object, but, as your Honor may
15 know, the attorney general has filed a notice of appearance
16 which was preceded and followed by public statements.
17 Without going into a lot of detail, that confuses us a bit
18 about the role the attorney general expects to take in this
19 case. We want to try to unravel that and not come to your
20 Honor unless we have to, but that is something that we have
21 to look at, and, you know, we won't need any special
22 hearings. I know that you have a schedule on omnibus and so
23 forth that, by the way, is perfectly fine with us, so with
24 that -- and, you know, we're talking about some post-petition
25 financing that we'd probably like to pursue, and that

1 requires --

2 THE COURT: Um-hmm.

3 MR. HEIMAN: -- a long explanation as well, and we
4 would hope that sometime in the near term we will know when
5 we would like to --

6 THE COURT: Um-hmm.

7 MR. HEIMAN: -- seek your Honor's views of that,
8 but, again, we're not ready today to suggest any deadlines.

9 THE COURT: All right. In other kinds of
10 reorganization cases, as you well know, courts do commonly
11 set a deadline for the assumption or rejection of executory
12 contracts so that the plan confirmation process doesn't get
13 delayed when such issues are raised just before confirmation,
14 so I guess I'm willing to grant you some latitude here, but I
15 don't want to get to plan confirmation and then run into
16 issues of what contracts are going to be assumed or rejected.

17 MR. HEIMAN: Your Honor, you raise a very good
18 point, and we have been looking at executory contracts.
19 Without belaboring the issue, it's a huge job in this city to
20 look at --

21 THE COURT: Right.

22 MR. HEIMAN: -- those, and at this point we have
23 nothing specific that we know of that we need to bring to
24 you, but there are -- in what I call the asset columns there
25 are some leases and arrangements and whatever that at some

1 point -- I am not talking about, you know, like next year --
2 at some point hopefully this year we will bring to your
3 attention if --

4 THE COURT: All right.

5 MR. HEIMAN: -- we think we need to.

6 THE COURT: Well, I think you understand my concern
7 here.

8 MR. HEIMAN: Yeah. And I appreciate it, and we will
9 make a special effort to accelerate our evaluation of those
10 executory contracts. Shall I go on with your agenda, your
11 Honor?

12 THE COURT: Well, let me just ask the question of
13 really everyone in the room point blank. I have suggested
14 these discovery deadlines, the date for a final pretrial
15 conference, and a date to begin the trial on eligibility.
16 Assuming I agree that discovery is required, and I'm inclined
17 to at this point, based on the record we have so far, does
18 anyone object to any of those dates on lines 8, 9, 10, and 11
19 of my Notice of Proposed Dates and Deadlines?

20 MR. HEIMAN: Sorry.

21 MS. CECCOTTI: Your Honor, once again Babette
22 Ceccotti, Cohen, Weiss & Simon, LLP, for the UAW. I'm not so
23 sure I'm rising specifically to object to those particular
24 items, but I guess with the open-endedness of -- despite the
25 efforts here today to try to outline for your Honor some

1 discovery issues -- and I should also point out that from our
2 perspective, some of the discovery may extend, you know,
3 beyond the city, so I'm wondering whether it would be helpful
4 if the Court were to perhaps think about the discovery
5 schedule and then perhaps build on that because there may not
6 be enough time. And, again, I don't think anyone here is
7 looking to delay any of this unduly, but there's a lot here,
8 and one of the things that I'm sure is not in anyone's
9 interest is to have some of these issues rushed. One doesn't
10 know what one is going to find in discovery, so I --

11 THE COURT: Well, let me just ask you. Are any of
12 the other discovery deadlines that I proposed here, in your
13 view, too aggressive?

14 MS. CECCOTTI: Yes. I think they might be too
15 aggressive. They might be too aggressive.

16 THE COURT: Which one or all of them?

17 MS. CECCOTTI: Well, again, if we're looking at the
18 whole schedule as a package, the whole schedule is fairly
19 aggressive in and of itself. In addition -- and we've
20 already had the reference made to the retiree motion -- we
21 don't know exactly how your Honor is going to view that
22 motion in the context of the schedule, and there have been
23 some suggestions that it would be worth considering this
24 schedule in the context of where your Honor ends up on the
25 retiree motion, so I wonder if it might be possible to

1 perhaps revisit the totality of the schedule, at least the
2 block of time, after your Honor has had a chance to hear the
3 parties on the retiree motion. It might actually inform the
4 Court rather than to try to set something now and then try to
5 shoehorn the retiree motion -- the retiree committee process,
6 assuming your Honor authorizes the motion, into a schedule
7 that your Honor is saying now it's just a scheduling
8 suggestion.

9 THE COURT: All right. Does anyone else want to be
10 heard on the specific dates and deadlines that I have set
11 forth here?

12 MS. PATEK: Your Honor, I apologize. Not specific
13 dates and deadlines, but I want -- if I may go back for a
14 moment to the 365 issue just --

15 THE COURT: Okay.

16 MS. PATEK: -- for the matter of preserving
17 something. I represent the public safety unions. Barbara
18 Patek. One of those, the Detroit Police Officers
19 Association, to my knowledge and understanding -- and I'm not
20 up to the minute because I'm not their labor lawyer -- does
21 have a contract in place, at least as of a couple of days
22 ago, so I don't know if that perhaps with everything they
23 have on their plate was simply off the city's radar screen,
24 but we were looking -- I don't have a particular deadline to
25 propose, and I just want that noted for the record.

1 MR. HEIMAN: No, your Honor, not --

2 THE COURT: Anyone else foresee any other kinds of
3 motions or adversary proceedings that it would be helpful to
4 know about now and perhaps set a time schedule for? Sir.

5 MR. HACKNEY: Good morning, your Honor. Stephen
6 Hackney on behalf of Syncora. I wanted to rise briefly to
7 say that it is possible that there will be additional
8 adversary proceedings arising out of the COPs and swap
9 structure that I think the Court has read --

10 THE COURT: Um-hmm.

11 MR. HACKNEY: -- probably more than it wants to
12 about, but there is already --

13 THE COURT: Probably.

14 MR. HACKNEY: Probably. Already litigation has been
15 initiated by the city against Syncora. Syncora has also
16 initiated litigation against the swap counterparties in New
17 York.

18 THE COURT: Um-hmm.

19 MR. HACKNEY: I think the Court has been made aware
20 of that.

21 THE COURT: Okay.

22 MR. HACKNEY: And I cannot be more specific other
23 than to say that --

24 THE COURT: Right.

25 MR. HACKNEY: -- it's entirely possible as you're

1 resolving -- as the various courts are resolving where this
2 can proceed, there may be additional adversaries that arise
3 out of that structure.

4 THE COURT: Right. Good. Thank you for reminding
5 me of that.

6 MR. HACKNEY: Thank you, your Honor.

7 MR. HEIMAN: I'm sorry, your Honor. I actually
8 appreciate that supplement because there may be some motion
9 or adversary arising out of that debt that's not with respect
10 to what's already being litigated, so --

11 THE COURT: Okay.

12 MR. HEIMAN: -- we don't know today.

13 THE COURT: Well, if so, that would happen fairly
14 soon and not likely to impact the plan confirmation schedule.

15 MR. HEIMAN: Right.

16 THE COURT: All right. Anyone else with any other
17 possible motions or adversary proceedings? I have one I'd
18 like to suggest to you, although we'll address that when we
19 get to the issue of committees. All right.

20 Let's talk about the deadline to file a plan. I
21 suggested March 1st.

22 MR. HEIMAN: Your Honor, we enthusiastically accept
23 that deadline. I would only supplement that acceptance with
24 a statement of desire on the part of the city, if I may.

25 THE COURT: Please.

1 MR. HEIMAN: And that is that we hope -- and our
2 view is that time is our enemy and that the facts are not
3 going to change no matter how long we wait, whether it's on
4 eligibility or filing of a plan, so we intend or hope to run
5 our process on parallel paths so that we can move as swiftly
6 as possible through this case, and, therefore, it is our hope
7 and desire that we will file a plan by year end, which is
8 well in advance of the deadline you have set. Now, there are
9 a lot of issues surrounding that, but that is our own target,
10 so --

11 THE COURT: Um-hmm. All right. Well, it would be
12 the Court's intention when a plan is filed to reconvene a
13 conference like this to set a schedule for litigating
14 whatever the issues are regarding that plan.

15 MR. HEIMAN: Thank you, your Honor.

16 THE COURT: Would anyone else like to be heard
17 regarding the deadline that the Court proposed? All right.
18 Thank you.

19 MR. HEIMAN: Next is item four, the mediation
20 proposal, your Honor.

21 THE COURT: Yes. Let's turn our attention to that.
22 Before you commence, I have a little introduction to give.
23 The Court does solicit the comments regarding its proposed
24 mediation order. The reason that the Court provided notice
25 of its proposed mediation order is because it would like

1 comments from you on whether this is a good idea in this case
2 or not. First, the Court would like to hear from counsel
3 regarding the concept of mediation in this case. Then we can
4 discuss the particulars of the order itself. The Court does
5 strongly encourage mediation in this case in order to
6 facilitate the consensual resolution of disputes to the
7 greatest extent possible. Bankruptcy certainly does offer
8 litigation as a means to resolve disputes, and the Court is,
9 of course, fully prepared to conduct the litigation of any
10 issue that the parties decide requires it. However, the goal
11 of bankruptcy is almost always better served through the
12 consensual litigation of disputes.

13 What is the goal of bankruptcy? The purpose and
14 goal of bankruptcy is to give the city a fresh start in its
15 financial life and to do so in the most expeditious and
16 efficient way possible. That's the goal of this bankruptcy
17 and really all bankruptcies. Everyone who practices in the
18 field of bankruptcy law understands that consensual
19 resolution will meet the goals of promoting the city's fresh
20 start better -- much better than litigation. There are two
21 reasons for this. The first reason is that after this
22 bankruptcy case is over, however it is resolved, many of the
23 city's creditors will continue to have long-term
24 relationships with the city. You know who you are, the
25 unions, the bondholders, the employees, the trade creditors.

1 Settlements can stabilize and even strengthen those long-term
2 relationships. On the other hand, litigation is not designed
3 for that purpose, and experience strongly suggests that it
4 will not have that effect. It may even be counterproductive.

5 Why is stabilizing and enhancing those long-term
6 relationships important to the city's fresh start? For the
7 simple reason that if these relationships are stronger and
8 more cooperative, it will help the city's recovery and
9 facilitate the city's ability to become the city that it
10 wants to be. Strong relationships between the city and its
11 creditors should also be important to the creditors because
12 it will place the city in a better position to do more
13 business with its creditors.

14 Finally and perhaps most important of all is that
15 consensual resolution of the city's disputes with its
16 creditors is in the best interest of the citizens of the City
17 of Detroit. Without addressing their legal rights as such,
18 the city that they deserve, a city that is strong, vibrant,
19 and responsive, is more readily achieved after a settlement
20 between the city and its creditors than after long,
21 expensive, and potentially bitter litigation. As a result,
22 the citizens of Detroit also have an important interest in
23 the outcome of this case that is as prompt and efficient as
24 possible. Sir.

25 MR. HEIMAN: Thank you, your Honor.

1 THE COURT: Hold on one second, please. Okay. All
2 right. After all, I do need to ask you to turn that
3 microphone so that its head is facing directly at you.

4 MR. HEIMAN: Is this better?

5 THE COURT: Turn it like 90 degrees so it's right --
6 pointed right at you. There you go.

7 MR. HEIMAN: Okay.

8 THE COURT: That's it.

9 MR. HEIMAN: Sorry.

10 THE COURT: Okay. But, again, I'm hearing noise in
11 the loudspeakers, so please check your phones to be sure
12 they're all off. Go ahead.

13 MR. HEIMAN: First, the concept of mediation.
14 Obviously you articulated better than I could possibly why we
15 support mediation. We want resolution. We don't want
16 protracted litigation. We want to move swiftly. Time is our
17 enemy, as I said. We are hopeful that a mediation process on
18 all important issues that relate to the plan or otherwise,
19 individual creditors' rights will be better served by
20 mediation, so, again, we welcome that and appreciate your
21 comments in that regard.

22 With respect to the order, which is your second
23 question, we have no desire to change any of the language
24 presented in the order as you've stated it.

25 THE COURT: All right. Thank you. And I want to

1 solicit the comments of others regarding the concept of
2 mediation and the particulars of the order. It's probably
3 not, however, appropriate to seek your comments in this forum
4 regarding the proposed mediator, and so I am going to ask you
5 if you have any comments, either -- on either side of the
6 question about the proposed mediator, I'm going to give you a
7 seven-day opportunity to submit to my chambers sealed and
8 confidentially any such comments, and so the actual entry of
9 the mediation order will be held up for that purpose, but at
10 this point I would like to hear from others on the concept of
11 mediation and the terms of the order.

12 MS. LEVINE: Your Honor, Sharon Levine, Lowenstein
13 Sandler, and I'm not sure because of the informal sort of
14 nature if I actually entered for whom I'm appearing, so with
15 the Court's permission, the Michigan Council 25 of the
16 American Federation of State, County, and Municipal
17 Employees, AFLCIO, and Subchapter 98, the City of Detroit
18 Retirees, which is the union's retirement group here in
19 Detroit.

20 First, we support mediation. We support protecting
21 our constituents in every way we possibly can within the core
22 proceedings. We had some discussion in the retiree motion
23 response about reservation of rights, and we've had some
24 conversations with the city's attorneys with regard to that
25 as well. We don't want the fact that we do recognize the

1 city has some serious woes here that it needs to address to
2 in any way detract from our --

3 THE COURT: Um-hmm.

4 MS. LEVINE: -- ability to go down dual or three
5 tracks.

6 THE COURT: Um-hmm.

7 MS. LEVINE: Two, with regard to the specific
8 language of the order, we would just ask for a clarification
9 with regard to decretal paragraph four, which I alluded to
10 when I approached the podium earlier. In addition to
11 mediating the difficult substantive issues that need to get
12 done, we do seem to be having some issues which we're hoping
13 that we're working through with regard to actually getting
14 access to information and the ability to have more of a give
15 and take in the process. And we're hoping that, to the
16 extent that there is a mediator, it's a full-service mediator
17 that can help us with process issues as well as substance
18 issues. Thank you.

19 THE COURT: Good point. Thank you.

20 MR. GORDON: Your Honor, Robert Gordon again on
21 behalf of the Detroit Retirement Systems. Your Honor,
22 without waiver of our position that accrued pension benefits
23 can't be diminished or impaired under the Michigan
24 constitution, the systems are not simply standing pat on that
25 position but are pursuing parallel -- the parallel path of

1 exploring ways in which the systems can be a part of the
2 solution. Having said that, in the context of discussing
3 mediation, it's important that -- again, harkening back to my
4 comments from earlier, that the Court understand a little bit
5 about where the negotiations actually stand. And this is not
6 with respect to any comments about whether those negotiations
7 meet the standard for good bid negotiations at all.

8 THE COURT: Okay.

9 MR. GORDON: This is about whether there's been
10 negotiations in general. To date there have been, as has
11 been indicated, several presentational meetings with the city
12 and the emergency manager and his financial and legal
13 advisors. There were presentations made at the airport on
14 June 14th. There was a presentation made on June 20th
15 regarding modifications possibly to pension and healthcare
16 benefits. There was a financial due diligence session
17 conducted in New York on -- I believe it was June 25th.
18 There were further financial due diligence sessions conducted
19 just on July 9th and 10th, roughly one week before this
20 bankruptcy was filed. These were due diligence sessions.
21 These were sessions to gather information. There were legal
22 and financial advisors from all the major creditor
23 constituents in a room asking questions about the cash flow
24 forecast, for example, and that really is the basis for the
25 proposal that was made by the emergency manager on June 14th.

1 Your Honor, those discussions made clear that there
2 are a number of not immaterial but very material financial
3 analyses that still need to be undertaken, and I want to make
4 it very clear. I am not by saying this casting any criticism
5 or aspersion on anyone. The emergency manager's team, as far
6 as I know, is working very hard, but there is information
7 that is not available at this time in the data room or
8 otherwise, and some of that I can even give you an example
9 because it's public. The emergency manager's proposal on --
10 that was disseminated on June 14th has those cash flows
11 available, a ten-year cash flow forecast there.

12 THE COURT: Um-hmm.

13 MR. GORDON: The emergency manager's proposal also
14 references, for example -- and this is just one example --
15 that there may be an initiative to create a water authority.
16 And in the root cause document that was issued a couple
17 months back by the city, there was some indication that such
18 an authority may free up tens of millions of dollars in
19 revenues for the city. Those numbers are not in the cash
20 flow forecast at this time.

21 THE COURT: Um-hmm.

22 MR. GORDON: And it's been readily accepted they
23 haven't, and the analysis is still ongoing as to what that
24 number should be. That is very important because if you look
25 at the cash flow forecasts, the premise of the proposal by

1 the emergency manager begins by -- with the fact that,
2 according to those cash flow forecasts, there is on average
3 over the ten years about \$80 million a year available for
4 payments to what are designated under his proposal as
5 unsecured creditors. The root cause analysis talks about
6 tens of millions. I believe it puts a range of maybe 30 to
7 \$70 million on that, so you can imagine just that item alone,
8 30 to \$70 million versus \$80 million, these are huge numbers,
9 and it makes it difficult to sit down and have fulsome
10 negotiations when there are things that are still in flux
11 like that. Again, it's part of the process. This is not a
12 mom and pop convenience store situation. There are a lot of
13 complexities, and I fully expect that the parties will engage
14 to resolve those informational issues, but they haven't
15 happened yet.

16 The Retirement Systems have also -- I feel like I'm
17 free to report to the Court -- have had discussions with
18 their actuaries to discuss different issues relative to this
19 matter. They are very complex issues, very complex issues
20 with respect to the actuarial calculations, and we have kept
21 the city --

22 THE COURT: This is the underfunding issue?

23 MR. GORDON: The underfunding issues or how cash
24 flows might be permitted as they -- whatever the cash flows
25 may be, how those could permit supporting the existing

1 benefits over time. We have kept the city, their legal and
2 financial advisors apprised of our progress on that front
3 with a view to being able to sit down with them, and it is,
4 indeed, anticipated that later this month we will hopefully
5 be able to sit down with our financial team and our actuaries
6 in the same room with the emergency manager's team and his
7 actuaries and start to have conceptual discussions about
8 actuarial issues, but that is just at the beginning stage at
9 this point, so I wanted to be clear about that. As a result,
10 it is our feeling that while mediation -- we have absolutely
11 no objection to the concept of mediation, we would
12 respectfully submit it's premature at this point. We are
13 going to make formal information requests of the city in the
14 near future. It's been all informal up to now because of the
15 out-of-court situation that we were in.

16 THE COURT: Um-hmm.

17 MR. GORDON: But we will be making formal requests,
18 and, of course, the city will need time to respond to those
19 requests. And then we would expect that the parties would
20 engage in negotiations to narrow the issues, and we think
21 that process needs to play out to some extent before we end
22 up in mediation. We need better information, and we need to
23 have had those discussions between the parties. So it would
24 be our suggestion in that regard, respectfully, the Court
25 consider something along the lines of perhaps having a status

1 conference every 30 days to see where we are in this
2 negotiation process to gauge when mediation may be
3 appropriate.

4 Rule 1001, as the Court has referenced, talks about
5 both a just and speedy administration of the case. Just is
6 as important as speedy is. We want to caution against
7 expediency merely for the sake of expediency. We all have a
8 sense of urgency. How could we not? But there is proceeding
9 with all due dispatch, and then there's proceeding in haste
10 and endangering parties' due process rights.

11 The sound bite that we hear that the city is broke
12 is a catchy sound bite, but -- we all understand the urgency,
13 but it is a bit of a sound bite. The city is not paying its
14 unsecured bond debt at this time. The city is not paying its
15 employer contributions at this time. The city is meeting its
16 payroll obligations. So while everything needs to move with
17 due speed -- we understand that -- again, it should not be
18 used as an excuse to move through this process faster than is
19 reasonable.

20 Your Honor, the stakes are high, and the men and
21 women of this city, current employees and retirees, deserve
22 to have their rights addressed in a careful and delicate
23 manner and not in a more --

24 THE COURT: All right. You make really --

25 MR. GORDON: -- blunt fashion all in the name of

1 expediency.

2 THE COURT: You make really important comments, and
3 I thank you for them. As I see the issue that you raise, it
4 is this. Who is in a better position to determine when the
5 actual mediation discussions should begin, either a mediator
6 or the Court? A mediator could meet with the parties on a
7 regular basis informally, supervise the expedited exchange of
8 information, and have potentially a better sense of when to
9 begin negotiations, or the Court, whose processes are much
10 more formal, much more public, more constrained. I'm
11 inclined to think that the mediator is in a better position
12 to say, okay, now it's time to actually begin discussions.

13 MR. GORDON: Your Honor, I will step back and say
14 this. What you've just described is a much more three-
15 dimensional mediation process than perhaps I was envisioning
16 and has often been the case.

17 THE COURT: Um-hmm.

18 MR. GORDON: What you're describing I think could be
19 constructive. I would not dispute that.

20 THE COURT: Well, please understand what I'm
21 referring to here and what I envision here is entirely
22 facilitative mediation. There's nothing that this mediator
23 will have the authority to do in terms of compelling any
24 particular outcome, so it's up to the parties to work with
25 the mediator on setting the agenda, setting the schedule, and

1 working through the issues. The ultimate deliverable is a
2 plan, assuming we get past eligibility, which I don't want to
3 assume, but for purposes of this we want to assume it, a plan
4 that has the support of enough creditors to be confirmed;
5 right? And in that regard, there may be other disputes that
6 should better be referred to a mediation panel than to the
7 mediator who is working on debt adjustment, and I think we
8 want to keep that option open also.

9 MR. GORDON: Thank you, your Honor, for those
10 thoughts and comments.

11 THE COURT: Okay.

12 MR. GORDON: Yeah. Without revisiting my comments,
13 it is consistent also with our concerns that are expressed
14 with respect to the retiree committee that, again, the
15 process not be used in a way that --

16 THE COURT: Right.

17 MR. GORDON: -- allows someone in a perfunctory way
18 to move --

19 THE COURT: Right.

20 MR. GORDON: -- through this process and say we've
21 met the obligations, let's just go to a plan confirmation
22 hearing when the parties really haven't had a real meaningful
23 opportunity to discuss the issues.

24 THE COURT: Right. You've already heard me speak on
25 the subject of why a consensual resolution is better than a

1 cramdown.

2 MR. GORDON: To that end, your Honor, the only other
3 comment I would make is that as to the proposed mediation
4 order itself --

5 THE COURT: Yes.

6 MR. GORDON: -- it is a little bit, I guess -- you
7 know, your Honor, I'll strike that comment.

8 THE COURT: Okay.

9 MR. GORDON: Based upon your comments, I'm fine.
10 Thank you.

11 THE COURT: Well, let me just offer this opportunity
12 to you, Mr. Gordon, and really anyone. In the seven-day
13 period that I'm going to allow for additional comments to be
14 submitted to the Court, you should also take that as an
15 opportunity to suggest any changes to the language or really
16 anything about the order that you'd like.

17 MR. GORDON: Thank you, your Honor.

18 THE COURT: Would anyone else like to be heard
19 regarding the proposed mediation order concept or terms? No?
20 Sir.

21 MR. HEIMAN: Your Honor, just two quick comments to
22 what Mr. Gordon said. The first is that I don't intend to
23 respond today to some of his characterizations. I don't
24 think that would advance the ball on the subject we're
25 talking about. And the second is your Honor asked me awhile

1 ago whether the city is willing to continue to negotiate with
2 its creditors. I think I responded that we're committed to
3 doing so, and I want to make that clear again in this
4 context. We do not view mediation as a reason to not
5 continue our discussions. Quite the contrary. If mediation
6 is going to be successful at all, it's our obligation -- and
7 the burden falls on us -- we recognize this -- to move the
8 ball here with information, discussions, or what have you, so
9 we, again, endorse the mediation concept as well as the
10 language of the order.

11 THE COURT: All right. Thank you. Let's move on
12 then and talk about the proposed order appointing a fee
13 examiner. Again, I have a bit of an introduction that I'd
14 like to give you and everyone. In considering and addressing
15 the issue of whether to appoint a fee examiner in this case,
16 the Court wants to assure everyone who might be affected by
17 such an order that it fully recognizes and accepts that
18 neither Section 330 nor Section 1104 of the Bankruptcy Code
19 applies in this Chapter 9 case. Those are the provisions of
20 the Bankruptcy Code that judges commonly rely upon in
21 appointing fee examiners in Chapter 11 cases.

22 Likewise, the Court states on the record here that
23 it has no reason to believe that the city's professional fees
24 in this case either have been or will be either excessive or
25 otherwise improper, no reason. Still, the Court has

1 concluded that it at least should suggest and discuss with
2 counsel the merits of appointing an independent fee examiner.
3 It is easy to predict in this case that there will be intense
4 media and public scrutiny of the city's professional fees.
5 Now, this is entirely natural and proper, and, frankly, the
6 Court encourages the public to remain fully informed about
7 all aspects of the case, including the professional fees that
8 the city is asked to pay. There is, however, a blunt truth
9 that motivates the Court to make this suggestion. It is
10 this. If the city's professional fees and professional fee
11 expenses have been processed through an independent fee
12 examiner, then two things are more likely. First, the city's
13 professionals will be in a much better position to justify
14 those fees to the city, and, second, the city will -- the
15 city itself will be in a much better position to justify
16 those fees to the public and to the citizens of the city.
17 Therefore, the Court sincerely hopes that the city and its
18 professionals will recognize and accept this blunt truth and
19 agree to some kind of a process for the independent review of
20 the city's professional fee expenses. The parties and
21 counsel should understand that the Court is willing to be
22 quite flexible on the design of the process and is fully
23 prepared to collaborate with counsel on the process of fee
24 examination if we agree to it.

25 There are, of course, many possible ways to

1 accomplish the goal. The process set forth in the Court's
2 proposed order is only one way. Likewise, the Court is
3 willing to be flexible regarding the process of selecting the
4 independent fee examiner. If we can agree in principle to
5 the concept, then I am confident we can work out the details
6 and identify a qualified individual. Having said that,
7 however, in order for the fee examiner to be truly
8 independent, probably the selection should ultimately reside
9 with the Court rather than with the city and its
10 professionals.

11 So, again, I'd like to solicit first comments on the
12 concept of an independent fee examiner and then regarding an
13 appropriate process. Sir.

14 MR. HEIMAN: Your Honor, the city accepts and
15 appreciates the concept, and we and the city and its
16 professionals are committed to working with a fee examiner,
17 whoever that may be.

18 As to the order, I had one I think very minor
19 comment, but it's consistent with your comments about
20 flexibility, which, as I understand your approach, would
21 be -- this hearing or the entry of an order would be followed
22 by a discussion between the fee examiner who you appoint and
23 us, the city and its counsel.

24 THE COURT: Yes.

25 MR. HEIMAN: And so if you look at the first

1 sentence of paragraph 6 and less so to the first sentence of
2 paragraph 5, there are issues in there, including rate per
3 hour and so forth -- and that is, in my mind, going to be
4 whatever it is, but it seems to us that that's somewhat
5 covered by 4(c) or could be covered by 4(c) at least and that
6 it might be better to move that to the proposed order that
7 the fee examiner presents to your Honor.

8 THE COURT: Um-hmm, um-hmm, um-hmm. Okay.

9 MR. HEIMAN: With that minor suggestion -- and I
10 must say it's not a big deal to us -- it's just a matter of
11 how the process is going to work -- I think I've responded to
12 your questions.

13 THE COURT: Okay. All right. Any other comments on
14 either the concept of a fee examiner or the terms of the
15 proposed order or any other order?

16 MS. GIANNIRAKIS: Good morning, your Honor. Excuse
17 me. Maria Giannirakis on behalf of Daniel McDermott, United
18 States Trustee. Your Honor, I'm here on Mr. McDermott's
19 behalf to comment on the Court's suggestion that a fee
20 examiner might be appropriate in this case, and although
21 we're not asking for the relief, we are offering the Court
22 information on our experience in Chapter 11 cases, and if the
23 Court finds this useful, I'd be happy to share it with you.

24 THE COURT: Please.

25 MS. GIANNIRAKIS: Thank you. We've certainly -- we

1 certainly see the utility of a fee examiner in this case. As
2 the Court has stated, the fee examiner could advance the
3 public interest and the public confidence by promoting
4 transparency in this highly publicized case. The U.S.
5 Trustee has supported the use of fee examiners in complex
6 Chapter 11 cases, and this endorsement is reflected in the
7 new fee guidelines for larger Chapter 11 cases that the U.S.
8 Trustee program has recently issued. The guidelines set
9 forth several models for the use of fee examiners and fee
10 committees and have proven effective. Most recently they
11 have been effected in the GM and American Airlines cases.
12 The fee examiner has not only proven to be effective and
13 efficient in identifying problems such as over-staffing, but
14 they've also raised other important legal issues for the
15 Court's consideration. Just an example, in the GM case the
16 fee examiner raised the issue of whether professionals should
17 give notice of different rate increases. These guidelines
18 and the information and guidance that's included in them
19 might be helpful to the Court, the proposed fee examiner, and
20 the parties. And just an example of some of the guideline
21 provisions that we think could be useful is the adoption of
22 professional budgets and benchmarking invoices to the
23 budgets, the submission by professionals of electronic
24 billing data, specific disclosure of comparable compensation
25 through the use of blended rates, the disclosure of whether

1 rate increase -- of whether rates increased post-filing, the
2 disclosure and calculation during the case of rate increases
3 and the effect of those increases on compensation, and the
4 consideration of standards for using co-counsel as efficiency
5 counsel. We agree with the Court, as the Court commented,
6 about Chapter 9 different from Chapter 11 but believe that
7 some of these comments could be useful and thank the Court
8 for allowing us to share that with you.

9 THE COURT: You're welcome, and thank you as well.
10 Any other comments?

11 MR. HEIMAN: Your Honor, I'd just like to add one
12 thing to note that there was a quite voluminous filing by
13 Godfrey & Kahn, and I have no comment about that except that,
14 for what it's worth, we don't think General Motors and Lehman
15 are in any way comparable to our situation. Hopefully we'll
16 have far fewer retained professionals and the like, and the
17 process will not be so complicated, but having said that --
18 and they said they would be in the courtroom. I don't know
19 if they are and may want to speak, but having said that,
20 again, we appreciate your Honor's approach and accept it.

21 THE COURT: Let me ask you this question. To what
22 extent do you think your office or your client or other
23 parties should be invited to participate in the selection of
24 an examiner, or do you just want me to do it?

25 MR. HEIMAN: That's an interesting question.

1 THE COURT: Again, there's a range of creative ways
2 in which we could handle this. We could do what --

3 MR. HEIMAN: I personally --

4 THE COURT: We could do here what we are doing in
5 the mediation context, which is just to allow you a seven-day
6 period to submit confidential sealed suggestions or comments
7 on this question.

8 MR. HEIMAN: I must say, your Honor, I'm just going
9 to let my hair down on this one. For me to suggest who I
10 would like to have examine my fees seems unseemly to me,
11 so --

12 THE COURT: Okay.

13 MR. HEIMAN: -- that's my gut reaction. I don't --
14 you know, my colleagues may beat me up after this hearing for
15 saying that, but that's my honest reaction. Your Honor has
16 expressed --

17 THE COURT: I understand and accept that.

18 MR. HEIMAN: Okay. So with that we have -- I think
19 I've addressed this already, your Honor. Number 6 on your
20 amended list is future conferences and hearings, and we
21 are --

22 THE COURT: Stand by one second. We do have --

23 MS. LEVINE: Sorry. Before we leave the --

24 THE COURT: -- Ms. Levine who'd like to be heard.

25 MS. LEVINE: Before we leave the fee examiner

1 issue --

2 THE COURT: Step forward, please.

3 MS. LEVINE: Your Honor, one of the issues and one
4 of the themes you've been hearing throughout this is trying
5 to maintain the credibility of a process that's a very
6 difficult process for people to have to go through.

7 THE COURT: Yes.

8 MS. LEVINE: So to the extent your Honor would
9 welcome it, I believe that we would like to have a voice at
10 least in having your Honor consider some thoughts with regard
11 to the fee examiner.

12 THE COURT: With regard to the identity of the fee
13 examiner?

14 MS. LEVINE: The identity, yes.

15 THE COURT: Okay. Will it suit your purposes
16 sufficiently if I give you seven days to submit to the Court
17 confidentially and under seal whatever your comments are?

18 MS. LEVINE: Yes. Thank you.

19 THE COURT: Okay. And this is an opportunity open
20 to everyone. Don't file anything, please. Just submit them
21 to my chambers directly --

22 MR. HEIMAN: And, your Honor, Mr. Bennett points
23 out --

24 THE COURT: -- by mail or hand-delivery, whatever
25 you want to do.

1 MR. HEIMAN: Mr. Bennett points out, as he so often
2 does, that I spoke for myself and not for the city, my
3 client, so I don't know what the city's reaction will be to
4 your invitation, and I just need to --

5 THE COURT: Okay.

6 MR. HEIMAN: -- make that clear.

7 THE COURT: Fair enough.

8 MR. HEIMAN: Thank you. Status conferences and
9 omnibus, I think I have already said we appreciate the
10 advance notice on those, and they look good to us, and
11 nothing further to add to that unless your Honor has a
12 question about it.

13 THE COURT: Just for notice purposes, the District
14 Court has requested that we not conduct hearings on the
15 morning of September 4th because there's another high-profile
16 matter that morning, so if we do have any hearings of any
17 kind on September 4th, they would be in the afternoon, and
18 I'll have to get back to you all on what time in the
19 afternoon.

20 MR. GORDON: Your Honor, I believe that's actually
21 Rosh Hashanah that night, so just to be careful --

22 THE COURT: Ah, we will have to be very careful
23 about that, too, yes. Thank you.

24 MR. HEIMAN: Your Honor, I --

25 THE COURT: On the issue of omnibus hearings, I

1 suggested a motion procedure that was very different from the
2 one that your office submitted in its motion. You want to
3 take that up now?

4 MR. HEIMAN: I would like to call on Ms. Lennox for
5 that purpose.

6 THE COURT: All right.

7 MR. HEIMAN: Thank you, your Honor.

8 MS. LENNOX: Thank you, your Honor. For the record,
9 Heather Lennox of Jones Day. What we had proposed in our
10 motion -- we tried to be fairly faithful to Local Rule 9014-
11 1, so I'm pleased to say that we just have a couple of
12 questions and clarifications on --

13 THE COURT: Okay.

14 MS. LENNOX: -- what your Honor might propose, and
15 some of them may be a little parochial or a little minor.
16 The first one that I view as perhaps a little parochial is
17 Local Bankruptcy Rule 9014-1(e) imposes a five-page limit on
18 replies for certain matters, and then the Eastern District of
19 Michigan rule has a similar blanket seven-page limit on
20 replies. It is more than likely that as the debtor in this
21 case, the city, will be doing omnibus replies to many
22 objections, and we would ask for your Honor's consideration
23 in waiving that at least as to the city.

24 THE COURT: Well, I'd rather deal with the issue now
25 than get a motion to waive it on a case-by-case basis. Is

1 there a limit that we can set within reason?

2 MS. LENNOX: I do think it depends on the issue,
3 your Honor. I mean if we're going to do a general limit, I
4 would propose a little higher, so it might be up to 20 pages.
5 For example, replies on eligibility could be quite lengthy.
6 Replies on minor matters could be much shorter. But I do
7 expect that there will be several objections that your Honor
8 would prefer to have one pleading from the debtor rather than
9 many.

10 THE COURT: All right. Well, then how about if I
11 put in the order that that is extended to 30 pages and, of
12 course, without prejudice to your right to request even more
13 in the context of a specific reply?

14 MS. LENNOX: Thank you, your Honor.

15 THE COURT: What else?

16 MS. LENNOX: There was also a question on
17 clarification that we had with respect to your Honor's
18 statement on 4(a) about not conducting an evidentiary hearing
19 on a motion unless the order and notice setting the hearing
20 states otherwise, and that is simply a procedural question
21 about how your Honor would like to proceed about whether we
22 should notice that ourselves, whether we should put a request
23 for that in the motion. How would your Honor like to address
24 that issue so the parties know how to handle it in advance?

25 THE COURT: The more information you can provide to

1 me about what it will take to resolve any given motion the
2 better, so, for example, if your motion foresees that there
3 will be factual issues, it would be helpful to identify those
4 factual issues and request an evidentiary hearing.

5 MS. LENNOX: In the motion. Thank you.

6 THE COURT: Right. At that point, I can decide
7 whether it's appropriate to conduct the evidentiary hearing
8 on one of these omnibus days or not, but I have to tell you
9 that in general I don't foresee conducting evidentiary
10 hearings at all on omnibus hearing days; that instead when
11 there are issues of fact, we will identify them and set a
12 schedule for whatever discovery might be needed, whatever
13 additional briefing on any legal issues might be needed, and
14 sometimes even a final pretrial conference and then an
15 evidentiary hearing, so I like the idea of your telling me
16 when you think an evidentiary hearing will be required and if
17 it's possible that it might be an extremely brief one to do
18 it on an evidentiary hearing day -- on an omnibus hearing
19 day, but more often than not -- much more often than not, I
20 foresee it playing out in a more traditional way. Does that
21 answer your question, or is it too vague?

22 MS. LENNOX: That does in large main, your Honor.
23 Part of the question -- and perhaps this is a follow-up
24 question -- is related to your admonition in -- your
25 perfectly appropriate admonition in Section 1 reminding

1 counsel that when you assert facts in a motion, you should
2 have an affidavit to support them, so I would expect that
3 there may be motions filed with affidavits that support facts
4 in the motion but maybe we don't need a whole full-blown
5 evidentiary trial on, things like that, so that --

6 THE COURT: Among the things we discuss at the
7 initial hearing is whether there are genuine issues of
8 material fact.

9 MS. LENNOX: Um-hmm.

10 THE COURT: And my suggestion or request, which
11 maybe I should actually incorporate in the order, that
12 parties advise the Court about whether they believe an
13 evidentiary hearing will be required applies also to
14 responses.

15 MS. LENNOX: Thank you, your Honor. Two other
16 things, your Honor. You mentioned in paragraph 2(c) that the
17 Court will let parties know at least two days in advance of
18 the hearing what matters you would actually like to take up
19 on the hearing. I am assuming for notice purposes in advance
20 of that two days that the parties should submit a notice of
21 hearing so that people will be -- people will be on notice of
22 the hearing date that is proposed for that motion.

23 THE COURT: My concern with that process is that it
24 has the potential for creating confusion.

25 MS. LENNOX: Um-hmm.

1 THE COURT: I would rather that the Court maintain
2 complete control over the process of issuing dates. If
3 you're concerned about two days not being enough time --

4 MS. LENNOX: That's the concern, your Honor.

5 THE COURT: -- we can talk about how to enlarge
6 that.

7 MS. LENNOX: That is the concern, your Honor.

8 THE COURT: Okay. What would you -- what would you
9 prefer then?

10 MS. LENNOX: I would propose, if it please the
11 Court, at least five days, particularly if we're going to
12 have many matters on for one hearing.

13 THE COURT: Okay.

14 MS. LENNOX: And then the last point that we had was
15 one of the requests that we had suggested in our motion, and
16 that is related to motions for relief from the automatic stay
17 under Section 362. We had suggested a procedure, and we
18 would ask the Court to consider it, that provides that if the
19 Court is not able to hold a hearing or is scheduling --
20 unwilling to hold a hearing within that 30-day period
21 referenced in Section 362(e)(1) that the stay not
22 automatically terminate until your Honor can hold a hearing.

23 THE COURT: I saw that in there. My problem with it
24 is I just don't think it's consistent with the requirements
25 of Section 362 itself. I can state for the record pretty

1 categorically that it would be my intent to set every motion
2 for relief from stay -- from the stay within the 30-day time
3 period because that's what I think the law requires, and I
4 think our history with motions for relief from stay certainly
5 suggests that we have been able to do that. I think setting
6 two motion -- or omnibus hearing days a month will permit
7 that to happen. In the odd event that it can't happen, we
8 can select a date that isn't an omnibus hearing date. We can
9 ask the creditor to stipulate to extend it to an omnibus
10 hearing date or, if necessary in odd circumstances, conduct a
11 hearing by telephone, so we have lots of options to comply
12 with that 30-day time period, and I'd rather do that than
13 just have an open door.

14 MS. LENNOX: Thank you, your Honor. That definitely
15 helps with clarification.

16 THE COURT: Okay.

17 MS. LENNOX: And that was all the clarifications
18 that I had. Thank you.

19 THE COURT: Anyone else have any comments or
20 questions or suggestions regarding the proposed motion
21 procedure? Okay. One more second, please. Okay. Are there
22 any other procedural or administrative questions, comments,
23 concerns that anyone would like to raise before we go on to
24 the motions that are set for hearing today? No? Okay.
25 Let's first address the motion for the order -- for the entry

1 of an order appointing Kurtzman Carson Consultants as claims
2 and noticing agent.

3 MS. LENNOX: Thank you, your Honor. The city has
4 filed a motion, as your Honor indicated, seeking to appoint
5 Kurtzman Carson Consultants or KCC as claims and noticing
6 agent in the city's Chapter 9 case to, among other things,
7 serve as the Court's agent to mail notices to creditors,
8 provide claims processing service, and provide computerized
9 claims database services, and we seek this relief pursuant to
10 28 U.S.C., Section 156(c). The city has identified more than
11 a hundred potential creditors, including, among others --

12 THE COURT: Has identified what?

13 MS. LENNOX: More than a hundred potential
14 creditors -- oh, I'm sorry -- a hundred thousand potential
15 creditors in this case. We've got employees, retirees --

16 THE COURT: Just three orders of magnitude up.

17 MS. LENNOX: Yes. Perhaps I should have added
18 another three zeros to that. In any event, there are quite a
19 few people that are going to require notices in this case,
20 and we think it might be burdensome on the clerk's office to
21 send those notices to all those folks. Before selecting KCC,
22 the city did solicit bids from third-party vendors to serve
23 as the claims and noticing agent, and we selected one with
24 relevant expertise in this district and relevant expertise in
25 a Chapter 9 case since they served as the claims and noticing

1 agent in the Jefferson County case, and they were the most
2 economical proposal at the end of the day. Again, we found
3 it important that KCC had experience working with this
4 clerk's office and this court, and they have assured us that
5 they will continue to follow the court's procedures and any
6 orders that might be entered by this Court. There was a
7 declaration of Evan Gershbein that was attached to the
8 motion. If your Honor has any questions of Mr. Gershbein, he
9 is in the courtroom today. So with respect to the motion, we
10 would ask for its approval. I don't believe, your Honor,
11 there have been any objections to it.

12 THE COURT: Okay. Yes. Would you ask him to step
13 forward, please?

14 MS. LENNOX: Yes. Mr. Gershbein, would you
15 approach? Would you like him to take the stand, your Honor?

16 THE COURT: No, no, no. Just to stand there is just
17 fine.

18 MR. GERSHBEIN: Your Honor, Evan Gershbein.

19 THE COURT: What is your name, sir?

20 MR. GERSHBEIN: Sorry. Evan Gershbein with Kurtzman
21 Carson Consultants.

22 THE COURT: Thank you. One second, please. One
23 more second, please. My clerk welcomes your participation.
24 She does, however, have a couple of details that she would
25 like to work out with you and to work them out in the context

1 of the order itself that the city has proposed.

2 MR. GERSHBEIN: Okay.

3 THE COURT: I'll just give you a heads up on them
4 and just ask you to consult with her, and then the city can
5 resubmit the proposed order to the Court. So there are two.
6 The one is simply creating a link for the court to use to the
7 claims register that you will keep, and the other is that you
8 should work with the clerk when it actually comes time to
9 file the notice of commencement because there's a very
10 specific ECF event code that's important to use.

11 MR. GERSHBEIN: Right.

12 THE COURT: So these are not details I need to be
13 involved in and don't want to be involved in, and so I'll
14 just ask you to work them out with her.

15 MR. GERSHBEIN: Absolutely, your Honor.

16 THE COURT: All right. That was it. Thank you.
17 Not too tough, huh?

18 MR. GERSHBEIN: Yeah.

19 THE COURT: Okay. All right. So when that's worked
20 out, Ms. Lennox, would you just submit your proposed order
21 through the order processing program?

22 MS. LENNOX: Thank you, your Honor.

23 THE COURT: All right. Let's talk next about the
24 motion for an order directing and approving the form of the
25 notice of commencement and the manner of service and

1 publication. I think that the deadline part of it we have
2 already figured out or at least are on the road to figuring
3 out.

4 MR. BENNETT: Okay. I think that's right, your
5 Honor. On the notice part, as you know, notice is required
6 in accordance with the statute notwithstanding the rather
7 large notoriety the case has already attracted. We propose
8 publishing the required notice at the required times in the
9 Detroit Free Press and the Bond Buyer. We've received no
10 objections, no comments at all to the proposed form of
11 notice, and so if it's acceptable to your Honor, we'll get
12 started on the process using the appropriate ECF code.

13 THE COURT: Um-hmm. Anyone have any comments or
14 questions regarding this motion? Two. Okay. Go ahead.

15 MS. PATEK: Your Honor, just for clarification on
16 the additional paper notice -- and that is part, I believe,
17 of the notice of commencement telling people what they have
18 to serve on the city. We did have a comment on that, and we
19 think -- we're totally comfortable with e-mail notice, but
20 given electronic filing and everything, we would --

21 THE COURT: Um-hmm.

22 MS. PATEK: -- prefer that from a cost and time
23 standpoint that there not be paper.

24 THE COURT: This is a -- this is a concern I share.
25 What is the need of the city and Jones Day to be mailed paper

1 copies of responses to -- or objections to eligibility in
2 this electronic age?

3 MR. BENNETT: We have no need, your Honor, and I
4 think I tried to mention that before. We are prepared to
5 dispense with it.

6 THE COURT: Excellent. Mr. Gordon.

7 MR. GORDON: Thank you, your Honor. Just one nit.
8 There is an identification of parties that are already
9 presumed to be on the special service list, which includes
10 creditors listed on a list of the 20 largest unsecured
11 creditors. That would include the two retirement systems.
12 However, there is no provision for counsel for those
13 retirement systems to be on the special service list unless
14 you file a motion, and I'd really like to dispense with
15 having to file a motion. Hopefully Mr. Bennett would agree
16 that counsel for those creditors should also be on the
17 special service list.

18 THE COURT: Sir.

19 MR. BENNETT: That's perfectly fine, and for anyone
20 else who wants to get on that list, if they want to contact
21 us informally, that's okay as well.

22 THE COURT: All right. Thank you.

23 MR. BENNETT: Your Honor, are you going to make the
24 changes to the proposed form of order, or would you like us
25 to --

1 THE COURT: No. I'm going to ask you to do it and,
2 again, submit it through our order processing program. Any
3 other comments or questions regarding this matter? All
4 right. Please let's give counsel till the close of business
5 on Tuesday to request to be included, and then you can submit
6 your order or actually let me ask this. Was your order
7 constructed such that it can be entered now, or do you need
8 to wait to find out the names of attorneys who want to be on
9 the special service list?

10 MR. BENNETT: Well, I think the order encompasses
11 both the notice part, which I think can -- we can do that
12 separately. I don't think it requires work on the order at
13 all.

14 THE COURT: Right. Okay.

15 MR. BENNETT: The deadlines, though, are there.

16 THE COURT: Right. All right. So I need to get
17 that order entered so that you can pick them up in the
18 notice. All right. Let's follow that sequence then.

19 MR. BENNETT: Okay.

20 THE COURT: All right. Let's turn our attention to
21 the motion regarding the appointment of a committee of
22 retired employees.

23 MS. LENNOX: Thank you, your Honor. The city has
24 decided to seek relief under Section 1102(a)(2), which is
25 made applicable to Chapter 9 by Section 901. We seek this

1 relief to assure the adequate representation of our retiree
2 creditors during this case. As we set forth in the motion,
3 retiree claims encompass pension benefits, which the city
4 estimates to be underfunded by about \$3-1/2 billion dollars,
5 and retiree healthcare benefits, which are pay as you go and
6 actuarially amount to about \$6 billion. We have
7 approximately 23,500 former employees with vested pension
8 benefits. We have almost 20,000 of them receiving retiree
9 healthcare. It is a very diffuse group of individuals.

10 Many of the city's legacy obligations but not all
11 stem from old collective bargaining agreements. The city has
12 47 bargaining units with 28 different unions, and there are
13 also four formal retiree associations which have voluntary
14 membership of which the city is aware. There may be more.

15 As we noted in the motion prior to this case, the
16 city solicited the unions to see if they were interested in
17 representing their current retirees. The overwhelming
18 majority said no. I do understand from reading their
19 pleadings filed yesterday that two of the unions, AFSCME and
20 the UAW, have reversed course on this issue, but, regardless,
21 we still have many orphan retirees. We also have
22 nonrepresented retirees, which comprise about 15 percent of
23 our retiree population.

24 Given the pressing financial crisis that the city
25 faces, the city filed this because it wants to have a clear

12 There are a couple of things I want to make clear.
13 In the papers we commented on who the city thought the
14 committee should represent, and we defined retirees as a
15 committee of former employees because we had assumed that the
16 unions would represent their active employees with respect to
17 this and other issues. However, the city does recognize that
18 active employees do have an interest in retiree benefits,
19 particularly those who have pension rights, so the city is
20 not opposed to the committee having representation for active
21 employees that have an interest in retiree benefits as part
22 of this committee as the U.S. Trustee sees fit, which brings
23 me to a further point, your Honor.

24 The U.S. Trustee had contacted the city after the
25 motion was filed to discuss the motion and the procedures

1 proposed. Now, I want to be clear here. The city did not
2 propose procedures to try to control the process. The city
3 understands that should your Honor grant the motion, the
4 formation of the membership and the selection of the members
5 of this committee are wholly within the purview of the U.S.
6 Trustee. It was simply suggested -- the city was simply
7 suggesting some procedures to form a logical process that
8 might be useful for people to consider. However,
9 understanding that the appointment of the committee, should
10 your Honor grant the motion, is within the purview of the
11 U.S. Trustee, we had discussions with the U.S. Trustee, and
12 we have agreed to remove the suggested procedures from the
13 order, and I think a lot of folks had commentary about that
14 in their objections. So the process to be used, should the
15 motion be granted, to select a fair and representative
16 committee will be the U.S. Trustee's own. Yesterday, your
17 Honor, we did file on the docket a revised form of proposed
18 order with these revisions reflected that is agreed to by the
19 United States Trustee. If your Honor needs a copy, I have
20 one with me that I can hand up.

21 THE COURT: Please.

22 MS. LENNOX: May I approach?

23 THE COURT: Please.

24 MS. LENNOX: That form of filing, your Honor, on
25 Exhibit A is a proposed new form of clean order to which the

3 THE COURT: All right. Stand by one moment while I
4 look at this. Thank you. Go ahead.

15 I do have responses to a lot of the objections that
16 were filed, but perhaps your Honor wants to hear the
17 objections beforehand.

20 MS. LEVINE: Good morning, your Honor, for another
21 minute. Sharon Levine, Lowenstein Sandler, for Michigan
22 Council 25 of the American Federation of State, County, and
23 Municipal Employees, AFLCIO, and Subchapter 98(c) of Detroit
24 Retirees. Your Honor, we represent the interests of between
25 40 and 50 percent of the city's retirees at about 11,943. We

1 represent about 70 percent of the non-uniform union
2 represented employees. We have 18 units of the locals that
3 counsel was referring to. We have units in every single
4 department in the city, including the police and fire
5 departments.

6 Your Honor, I'd like to address a couple of issues
7 raised. First and foremost, when we first started drafting
8 this response, we drafted it like we were answering a law
9 school exam, and we were originally going to take the
10 position before your Honor that you can't do this kind of
11 thing before there's an order for relief, and we have serious
12 eligibility issues and concerns along those lines. We've had
13 conversations with the city and are hoping that today they
14 will affirm that all of this action, mediation, retiree
15 committee, et cetera, is going to be taken without any
16 prejudice to any of those rights, constitutional,
17 substantive, technical, whatever else they are.

18 THE COURT: I agree.

19 MS. LEVINE: But regardless, the goal of our union
20 is to work as hard as we can for all of our retiree and
21 active members in every avenue that's available to us to work
22 through this process. And in addition to that, we appreciate
23 the city's comments that they recognize that a lot of the
24 active employees have interests in their pension benefits and
25 in their medical benefits as well, which brings me to another

1 point, which is there's some -- there's been some concern
2 raised with regard to whether a union can actually represent
3 its retirees.

4 THE COURT: Um-hmm.

5 MS. LEVINE: I'd like to respond two ways. First,
6 legally we believe that the answer -- again, looking at the
7 law school exam, that the answer is yes, that we have
8 historically under our internal workings represented our
9 retirees. In fact, at the International level, we have a
10 designated person and a group that works with that person who
11 just deals with retiree issues, so in that regard, we would
12 fully expect to represent the retirees along with the
13 actives, especially since a lot of the issues here overlap.
14 And we've submitted the certification of -- from the union
15 specifically talking about the fact that we do provide these
16 services with regard to the retirees on a regular basis.

17 That said, your Honor, as a practical matter, in
18 handling the situation in other cases -- and while they've
19 been Chapter 11 cases under 1114 and not the unique situation
20 we find ourselves in here, we have seen the United States
21 Trustee's Office deal with this issue three separate ways:
22 (a) actually appointing the union to the retiree committee;
23 (b) appointing the retiree group affiliated with the union,
24 which we represent here, to the retiree committee; or
25 appointing individuals who are either members of the union or

1 members of the retiree committee. And in either of those
2 three circumstances, we're committed to bringing the full
3 support of the union to the process and hopefully
4 constructively interfacing with the retiree committee's
5 professionals and working through some of these difficult
6 issues. With that said, your Honor, we start with the
7 premise that we don't believe that there's a conflict, and we
8 don't think that your Honor needs to rule on that issue.

9 Your Honor, the other issue that we did want to
10 touch on just briefly is with regard to the timing, but we do
11 think that your Honor addressed it adequately before, but we
12 just want to state for the record that to the extent that
13 your Honor enters scheduling orders in this case, we hope
14 that they're without prejudice to come back to your Honor --

15 THE COURT: Um-hmm.

16 MS. LEVINE: -- in case circumstances change,
17 including after the retiree committee gets up and running and
18 its professionals get engaged. And with that, your Honor, we
19 would just close by suggesting that we represent a large
20 number of people here. We're very concerned about this
21 process. It's a nice day today, but it's going to be cold
22 this winter, and they're very concerned about their pension
23 benefits, their health benefits, and moving forward
24 constructively to resolve the issues here because regardless
25 there's going to be something that has to happen in order to

1 resolve these issues. Thank you.

2 THE COURT: Thank you. Anyone else on this motion?
3 Ms. Brimer. Oh, Mr. Gordon.

4 MR. GORDON: Thank you, your Honor. Robert Gordon
5 again on behalf of the Detroit Retirement Systems. Since we
6 did file papers, if I could at least acknowledge the fact
7 that we did file papers on this, and there have been other
8 papers filed subsequently by a number of parties that cover
9 the same issues, so, from our perspective, the concerns have
10 been addressed, I believe, by Ms. Lennox as far as not
11 marginalizing anybody in the process and in the selection
12 process with the U.S. Trustee's Office and giving the U.S.
13 Trustee plenty of space to make their own decision.

14 The only other thing that hasn't been raised yet is
15 we suggested in our papers that there's -- if there is going
16 to be a retiree committee, it ought to be able to function
17 properly, and so there should be some provision made for
18 compensation for reasonable professional fees. Obviously
19 that's not necessarily imbedded in the Chapter 9 context, so
20 it seems like if that is something that's desirable to the
21 city, there ought to be some provision made for that because,
22 again, Chapter 9 doesn't quite cover it very well. Thank
23 you.

24 THE COURT: Now Ms. Brimer.

25 MS. BRIMER: Well, good afternoon, your Honor. Lynn

1 M. Brimer appearing again on behalf of the Retired Detroit
2 Police Members Association. Your Honor, we filed a response
3 and very limited objections to the city's motion.
4 Fundamentally we understand perhaps in the long term the need
5 for committees in order to effectively negotiate a resolution
6 of whatever disputes may arise with respect to fully funding
7 the pension rights of the city's retirees. However, we have
8 several concerns with the motion and the proposed order as
9 it's presented.

10 First -- and I addressed this earlier, your Honor --
11 there is a concern with whether or not at this stage in this
12 proceeding there is authority for the U.S. Trustee's Office
13 to, in fact, appoint -- to go to the complete step of
14 appointing a committee. While we believe it may be
15 appropriate, without waiving any rights to our objection to
16 eligibility for this Chapter 9 to proceed, for the U.S.
17 Trustee's Office to begin the process of attempting to select
18 and appoint the committees that should this Court determine
19 eligibility should be appropriately appointed, however,
20 appointment at this point may chill some of the existing
21 retiree associations from actively pursuing their rights with
22 respect to eligibility and may ultimately be that the
23 committees are not properly authorized under Section 1102(a),
24 which, in fact, does authorize appointment of committees
25 after an order for relief. And if you look at at least some

1 of the more recent cases that have been filed, they are
2 instructive to the extent that in the matter of In re. The
3 City of Vallejo the Court, in fact, found that the
4 appointment was premature prior to the order of relief. In
5 the matter of In re. The City of Stockton, California, the
6 orders were entered, you know. Immediately after the order
7 for relief was entered, the Court then appointed the
8 committee, which would tend to indicate the procedures were
9 in place, and the Court acknowledged what the restrictions in
10 Section 1102(a) are.

11 With that in mind, your Honor, we still have, should
12 the Court determine that it is appropriate to appoint a
13 committee at this point and assuming -- without waiving our
14 rights to object to eligibility, assuming this case proceeds,
15 we, nonetheless, still have some concerns with some of the
16 issues raised in the motion. The procedures issues may have,
17 in fact, been addressed by the city. We think it is
18 completely inappropriate for the city not to control. The
19 issue is influence. They should not even influence the
20 selection process for appointing committees.

21 We do not believe it's appropriate for any of the
22 unions or any representatives of current employees to have
23 representation on committees that represent retirees.
24 Continuing wages and continuing current benefits may impact
25 their willingness or their participation in negotiating with

1 respect to pension distributions.

2 That raises the concern we have also with respect to
3 whether or not one committee for retirees would be
4 appropriate. As this Court may be aware, police and fire-
5 fighters do not participate in the Social Security
6 Administration; therefore, to the extent any of their pension
7 benefits are reduced in this process, they will not have the
8 same opportunity to pursue Social Security as perhaps the
9 retirees of the general retirement system would have. They
10 may have, therefore, very different interests in pursuing
11 negotiations and may have to negotiate a different resolution
12 of their benefits than the retirees who participate in the
13 general retirement system.

14 Then, finally, the issue that was raised by Mr.
15 Gordon is extremely important, and that is funding. If there
16 are committees to be appointed, one or more committee, in
17 order to properly be able to negotiate and address issues
18 raised by the city, it must be funded. All of its
19 professionals must be funded. Legal and any accounting or
20 other actuarial type professionals that they would require
21 should be funded. Even though I do understand that funding
22 is not required, those provisions are not incorporated into
23 Chapter 9, the fact that this Court recognizes the need for a
24 fee examiner when, in fact, the fees are not subject to this
25 Court's review under Chapter 9 is an acknowledgement that

1 this Court understands that funding and the protection of the
2 public interest is of utmost importance in this case.

3 THE COURT: My question for you is really a process
4 question. Does the Court have the authority to give
5 direction and instruction to the U.S. Trustee in an order
6 granting a motion like this, or is the process that the U.S.
7 Trustee exercises its discretion, and then the Court, upon
8 motion, reviews that after the fact?

9 MS. BRIMER: Well, I believe, your Honor, that,
10 frankly, our U.S. Trustee's Office has the discretion and, in
11 consultation with the various retirees and other interested
12 parties, can evaluate what the appropriate procedures would
13 be for selecting the committee. I can -- I recognize why the
14 city filed this motion and brought it to the Court's
15 attention that it would be very important in order to
16 effectively advance negotiations that they are not
17 negotiating with multiple retirees, individual retirees;
18 however, I do believe that at this stage of the proceeding,
19 it would be appropriate for the U.S. Trustees to exercise
20 their discretion, move forward with the process for
21 selection, and then present the Court with an order for the
22 appointment of the committee.

23 THE COURT: Okay. Thank you. Mr. Morris.

24 MR. MORRIS: May it please the Court, Thomas Morris
25 of Silverman & Morris. I'm co-counsel with Lippitt O'Keefe,

1 PLLC, representing the Retired Detroit Police and Fire
2 Fighters Association and the Detroit Retired City Employees
3 Association. The first organization has been in existence
4 for more than 30 years, and the General Retirees Association
5 has been in existence for more than 50 years, and these two
6 organizations represent -- have as their members
7 approximately 70 percent of retirees.

8 The reason we filed the response to the motion was
9 we objected to the city's proposed involvement in the
10 selection process and also the proposed involvement of the
11 unions. The present employees of the city, most of whom are
12 members of unions, have a very significant interest in seeing
13 that their present wages are protected and their future
14 benefits are protected, but they have a different interest
15 than do the retirees. I take the -- we understand the
16 proposal for a retiree committee to be just that, a committee
17 of the retirees by the retirees and for the retirees, and
18 it's not -- there's a lot of interests in this case to be
19 served. This committee should not be everything to everyone.
20 That's why we support the appointment of a committee, as I
21 said, of retirees.

22 As to whether the Court -- whether it's appropriate
23 for the Court to direct the U.S. Trustee in the details,
24 that's -- the pared down proposed order is acceptable to us
25 that leaves the details to the U.S. Trustee. I can

1 understand the Court ruling that way looking at the
2 separation of powers. The reason for the U.S. Trustee's
3 Office being separate from the court is to separate powers.
4 We did submit a proposed order, which has some specific
5 provisions that we would like to see in the order if the
6 Court does prepare a more detailed order. I agree with the
7 other comments that the scheduling order should allow the
8 retiree committee, if and when it's formed, more time.

9 Your Honor, the associations hope to work with the
10 committee and with the unions to help to reorganize the city
11 and reach a deal, but we do think the retirees have special
12 interests; that that interest has been represented by the
13 associations with their unique situation, having been in
14 existence for years representing such a high percentage of
15 the retirees, having gone through and prepared and adopted
16 by-laws, elected officers and directors, and we think all
17 those are important considerations for the U.S. Trustee. We
18 have submitted and received from members of the associations
19 proxies, not legal proxies, but written recommendation that
20 the officers and directors of the associations be considered
21 as -- for membership in the committee.

22 THE COURT: One second, sir. Letrice, would you go
23 adjust that mike stand to see if that takes care of the
24 knocking that we're hearing through the loudspeaker? All
25 right. Let's try that and see if that will solve our

1 problem, and you may continue, sir.

2 MR. MORRIS: Yes, your Honor. We submitted to the
3 membership documents for them to sign to recommend for the
4 inclusion in the committee officers and directors of their
5 associations. I think it'll be more appropriate for us to
6 take that up with the U.S. Trustee, but we do have those
7 available for the Court if the Court decides to get involved
8 in the process to that detail. Thank you.

9 THE COURT: Thank you, sir. Other comments?

10 MS. PATEK: Your Honor, once again Barbara Patek
11 appearing on behalf of the public safety unions, the three
12 police unions, and the Detroit Fire Fighters Association. We
13 did file a response and a limited objection to the city's
14 motion. We are looking for four things, and I --
15 understanding the limitations and the role of the U.S.
16 Trustee's Office, we're looking for a seat at the table.
17 We're looking for the U.S. Trustee to control the selection
18 of the committee, and we are also looking for a mechanism for
19 this committee to be adequately funded. Otherwise it will
20 not make it an effective process, and the two things that we
21 have suggested -- and we understand under Chapter 9 because
22 of the limitations, it would require the city's consent --
23 would be that the city consent to pay the reasonable
24 professional fees of the committee and delegate the
25 responsibility for determining the reasonableness of those

1 fees to the fee examiner to be appointed by the Court.

2 We filed our response without prejudice to our right
3 to object to eligibility, of course, and we are not conceding
4 that the formation of such a committee would make it the sole
5 negotiator on the issues before the Court.

6 I want to address the Court's question about
7 1102(a)(2) and (4) and the order in which things should
8 happen, and it seems as though we have perhaps already leapt
9 over the obstacle of having an order for relief. And I
10 suggest, to the extent that the Court finds that it has
11 authority, that given the -- that everyone in this courtroom
12 agrees that time is not on its side, that from the standpoint
13 of judicial economy and the efficiency of the process, that
14 the Court in this case may be in a position -- ultimately the
15 U.S. Trustee is going to select this committee, but to give
16 some direction based upon the information that is being put
17 before the Court this morning, and to that end I would like
18 to speak briefly to the circumstances of my constituents.
19 And appreciating that there -- if we were in a Chapter 11,
20 there would be specific provisions that would govern both my
21 clients' rights and the rights of the separate retirees under
22 1113 and 1114, we are in a very different circumstance in
23 this case in terms of there's nothing usual about this case,
24 but from the standpoint of collective bargaining -- and you
25 heard the city's counsel say it earlier this morning -- from

1 their perspective, all the bargaining units, pursuant to the
2 Emergency Manager Act, their position is -- and I'm not
3 conceding this because I don't for sure know the answer to
4 it -- are under imposed conditions of employment or imposed
5 terms that have been imposed on them by the emergency
6 manager. To date, the position has been first under Public
7 Act 4 and then later after that was repealed under 436 -- the
8 position of the city has been we have no obligation to
9 bargain with you. We can pretty much do anything to you that
10 we want except modify your pension. For that we need
11 Bankruptcy Court, and now here we are. And we are a group
12 that -- aside from the fact that our active employees do have
13 vested benefits, this retiree group is obviously a rolling
14 group, some by choice and some not by choice, may be moved
15 very quickly even as this process is proceeding from active
16 to retiree, and the issue of these pension benefits is the
17 400-pound gorilla in the room. And so for that reason, we
18 think -- you know, we are advocating to have a seat at this
19 table. We understand the Court can't tell the trustee who to
20 put on the committee, but in terms of making it
21 representative, there are a lot of different constituencies
22 from the folks, as I think Ms. Brimer pointed out, who have
23 no Social Security -- and some of them I understand don't
24 even have Medicare to fall back on -- to some people who
25 perhaps have more luxurious pensions and a second career.

1 There's a lot of different constituencies, and the goal will
2 be to get a representative constituency, and I'm going to
3 return to, I think, from our perspective, we want not only
4 representation, but it's critical that this committee, if the
5 Court is going to appoint it, be adequately funded so that
6 there can be a real and serious conversation about how this
7 problem can be solved. Thank you, your Honor.

8 MR. GOLDBERG: Good morning, your Honor. Jerome
9 Goldberg. I represent party of interest David Sole, who is a
10 retiree himself and was a former president of UAW SCATA, a
11 chemist, and whose wife also is a retiree as a bus driver. I
12 also filed an objection in this case, and we basically cited
13 that our interpretation and our view of the plain language of
14 the statute is that this motion is premature, that 11 --
15 Section 1120 -- 1102(a) states that the trustee has the
16 authority to appoint committees after a order for relief is
17 entered, and 11 U.S.C. 921(c) provides that in a Chapter 9
18 case the Court shall order relief only after objections to
19 the eligibility issues have been resolved and the
20 determination on eligibility has been made. That's why we
21 believe that the appointment of a retiree committee at this
22 point would be in plain violation of the law.

23 Why we feel that's so important is that the -- as
24 your Honor stated earlier, that one of the critical issues in
25 eligibility is the applicability of the state limitation

1 on -- constitutional limitations on impairing pension to this
2 case. That's a critical question that not only affects the
3 thousands of retirees in this case, but it also will have
4 national impact. There are 24 other states that have
5 guarantees on pension. They're looking at what the decision
6 is going to be on that issue. And our concern is in
7 designating a retiree committee, especially the way it was
8 initially proposed by the city, which would essentially be
9 the only spokesperson for the retiree, it could have the
10 effect of dampening the participation of all interested
11 parties who choose to participate in this critical question,
12 whether they be retiree associations, the unions, the
13 retirement boards, all of whom already have done so and whose
14 participation we fully respect, or individual retirees.
15 There needs to be the fullest participation in this critical
16 question that will have implications in Detroit and all over
17 the country.

18 THE COURT: Why would this committee do that, or how
19 would it happen?

20 MR. GOLDBERG: Well, just listening to the debate
21 here, we hear everyone vying for who will be on the
22 committee, but what we say -- again, we say the plain
23 language of the statute bars the formation of this committee.

24 THE COURT: No. I understand that, but you asserted
25 that the formation and participation of this committee in the

1 eligibility question will discourage others from asserting
2 their issues. Why would that happen? How would that happen?

3 MR. GOLDBERG: Well, let me just say that in the
4 city's motion for this, the city provided that the retiree
5 committee would provide a single party to negotiate with the
6 city on behalf of retirees as a group.

7 THE COURT: They've moved past that; right?

8 MR. GOLDBERG: Well, it does sound like they've
9 moved past that today, and I appreciate that they've moved
10 past it today, your Honor.

11 THE COURT: Okay.

12 MR. GOLDBERG: But, again, I really do feel that at
13 this point it's improper. At this point the critical
14 question is the eligibility question and the
15 constitutionality, and, in fact, what would the committee
16 even be negotiating on at this point? To spend time debating
17 who should be on a committee when the scope of what the
18 authority is on the issue of pensions and whether there's
19 even authority in this question seems to me to be a diversion
20 from the issue of eligibility that needs to be decided first
21 under the law, and that is really the significant question in
22 front of everybody right at this moment.

23 THE COURT: Of course, the statute says the Court
24 has the authority to order this after an order for relief is
25 entered; right?

1 MR. GOLDBERG: Yes, it does.

2 THE COURT: It doesn't say the Court doesn't have
3 the authority to do it before that, does it?

4 MR. GOLDBERG: Well, I think by the language of the
5 statute, it empowers -- it states when the Court has that
6 authority, and 921 imputes that right into it, says the Court
7 shall order relief only after objections to the eligibility
8 questions have been heard. Thank you, your Honor.

9 I just want to make one other point, too, just for a
10 point of correction to the city's motion that the city
11 indicated that the city is the only authority that -- that
12 the city has the authority to amend pensions, and just to
13 clarify, I did attach Section 4744 of the Municipal Code 2 as
14 an exhibit to our brief and which states very plainly that
15 that authority does not apply to vested pensions. Thank you,
16 your Honor.

17 MS. CECCOTTI: Good morning again, your Honor.
18 Babette Ceccotti, Cohen, Weiss & Simon, for the UAW. We did
19 file a short response to the motion, and I'll touch briefly
20 on essentially three items that we've covered.

21 First, the UAW is not taking a position specifically
22 with respect to the 11 -- what I'll just call 1102 issue,
23 whether the Court should grant the motion now. We are,
24 however -- to the extent the Court does grant the motion, we
25 want to emphasize three points, some of which have already

1 been touched on by counsel. First, the funding issue. We've
2 stated in our motion that the UAW, if such a committee is
3 formed, would be interested in declaring its interest in
4 serving on the committee. Critical to the UAW's thinking in
5 that regard and decision-making would be a sense that the
6 committee is going to be able to have adequate resources to
7 adequately perform the job that the committee is being formed
8 to perform, and you've heard the other speakers. I won't
9 belabor the point, but we do consider the funding to be very
10 critical here, funding by the city, and we have suggested in
11 our papers that the city should indicate its intention so
12 that the Court has that information before it in terms of
13 making a decision regarding granting the motion.

14 Second, on the -- we've indicated reservations of
15 rights issues as well. Ms. Levine touched upon them. Others
16 have as well. And we understood the Court to be cognizant
17 and agreeing with us on that point, so I won't --

18 THE COURT: I am and I do.

19 MS. CECCOTTI: Thank you. So that leaves me with
20 our third point, which is the point of adequate
21 representation, and I regret that we have -- or being the
22 U.S. Trustee thinks that we've initiated a disputed with
23 them -- it was certainly not our intent to do so. We
24 certainly have respect for the office -- their office, and we
25 understand their role and respect the role that they play in

1 forming committees. However, that said, we do think that
2 some guidance by the Court -- if the Court, again, were
3 inclined to grant the motion, that some guidance just to deal
4 with just some very practical considerations -- and I think
5 you've heard some of them here today. When the city filed
6 its motion, as Ms. Lennox indicated, they at first proposed a
7 series of rather detailed procedures. The revised order that
8 has been submitted to the Court has deleted those procedures
9 with the expectation, and I think appropriately so, that the
10 U.S. Trustee would be designing the solicitation procedures
11 and the process by which it would form the committee.
12 However, let's take a step back and let's assume that the
13 city had not attached any suggested procedures. One would --
14 we would have had a motion to appoint a retiree committee
15 with a definition and, you know, perhaps some very general
16 definition by the city and nothing more. And without any
17 further guidance, the U.S. Trustee would have immediately,
18 I'm assuming, just based on some of the questions that have
19 been raised here today, have confronted a series of
20 questions, some of which might be just considered procedural,
21 but some of them would be quite basic, the scope of the
22 committee's purview, whether the committee should include or
23 can include individuals, associations, and labor unions,
24 questions about -- the questions that you've already heard
25 discussed before your Honor today about labor unions serving

1 and in what capacity. These questions we could see, as a
2 practical matter, might bog down the process to the point
3 where either the parties would be back here before your Honor
4 anyway or the U.S. Trustee, doing its best to take on those
5 issues and try to solve them just themselves, would
6 undoubtedly spur additional proceedings before your Honor
7 anyway. So our thought was that -- and we understand
8 normally how the sequencing goes. We've read the statement
9 submitted by the office. We still think that 1102 does
10 contemplate a role for the Court and that in terms of -- not
11 with respect to detailing and wordsmithing procedures and not
12 with respect to dictating or directing that specific entities
13 or parties be appointed, but that, nonetheless, the
14 framework, if you will, or the table that's being set for the
15 office to perform its functions appropriately resides with
16 the Court, particularly given the array of comments that the
17 Court -- that have been filed both with respect to the legal
18 issues but also with respect to issues of composition. We
19 state -- we have stated -- and, again, the UAW has a lot of
20 experience on creditors' committees, on general creditors'
21 committees and in the Chapter 11 context in the 1113 and 1114
22 process and outside of bankruptcy, and one of the things that
23 labor organizations do is engage with employers on complex
24 matters such as pension benefits, health benefits, retiree
25 health benefits, other types of benefits as well. It makes

1 the unions, in our view, who take on this role -- and the UAW
2 is another union that historically does take on this role --
3 particularly well-suited to a project like this and a
4 committee like this where their facility with being able to
5 engage on these matters will aid in the effective functioning
6 of the committee. So we made the suggestion that we did in
7 our papers that the Court provide some direction on, again,
8 the framework and scope and eligibility, if we can put it
9 that way, in order to make sure that, first, the --
10 everyone's goal here, if your Honor grants the motion, is
11 that the committee be effective and be able to function
12 effectively with -- not only with funding but with members
13 who can effectively undertake the task. This is an enormous
14 task, and you've already heard about the human element here.

15 Second, in terms of participation and scope -- and
16 we've made this point in our papers -- if there is a group
17 that feels disenfranchised -- and we think this is -- I would
18 put this in the heading of guidance that the Court could
19 provide to the U.S. Trustee in fulfilling its role here. If
20 there are groups that are left out for some reason or feel
21 excluded, that will directly affect the credibility of the
22 process, and it doesn't do the Court any good or any of us
23 any good to have a committee like this formed, as I've said
24 already, that cannot effectively complete its task. And if
25 you have skepticism engendered by exclusions or if some folks

1 have -- some groups have been selected to serve and some
2 haven't, undoubtedly that will have ramifications. So we
3 think that, again, with all due respect to the Office of the
4 U.S. Trustee and with no intention at all to interfere with
5 their proper function in conducting the solicitation and the
6 formation, we do think that some guidance along the lines
7 that we've set forth in our papers in here would be
8 appropriate and is also appropriate under the statute itself
9 without crossing -- unduly crossing any lines or
10 inappropriately crossing any lines in terms of the division
11 of labor between the Court and the U.S. Trustee's Office.

12 THE COURT: Let me ask you this question.

13 MS. CECCOTTI: Sure.

14 THE COURT: I heard today a concern that a union
15 which represents by law present employees may have either an
16 actual or a potential conflict of interest in representing
17 retired employees. How do you address that concern?

18 MS. CECCOTTI: A couple of ways, your Honor. First,
19 unions that -- like the UAW that are very familiar with the
20 bankruptcy process and have served, as I said, in Chapter 11
21 cases for the most part undertaking those roles, are very
22 skilled in -- not only very skilled in the substance of the
23 subject matter but in making the internal institutional
24 decisions to undertake representation of both actives and
25 retirees. They do not see an inherent conflict in taking on

1 both -- in taking on that -- I was going to say both roles,
2 but it really is a continuum. It's really viewed as a whole,
3 and I'm speaking now really for the UAW. You heard Ms.
4 Levine speak on behalf of AFSCME. These are decisions that
5 individual labor organizations make based on their own
6 institutional history and organization and their own
7 institutional functioning. We do not think it would be
8 appropriate for an outsider to simply make a blanket across-
9 the-board statement that -- statement -- excuse me -- that
10 simply because we have a labor organization that is
11 representing a unit of actives, that labor organization is,
12 per se, disqualified. The first question to ask is what does
13 that particular union think about that -- what is the
14 position of that particular union? The UAW does not see an
15 inherent conflict and hasn't throughout its history. It's
16 been actively involved in retiree matters as -- with respect
17 to retiree interests, not simply actives as future retirees
18 but current retirees. They have -- and that is, again, part
19 of their history, so I think that it is not possible really
20 to make a blanket statement to that effect and that each
21 labor organization answers that question for itself and
22 should be permitted to do so given its own institutional
23 operation and history.

24 THE COURT: Next question.

25 MS. CECCOTTI: Um-hmm.

1 THE COURT: You have argued that the Court has the
2 authority to give the U.S. Trustee's Office guidance.

3 MS. CECCOTTI: Yes.

4 THE COURT: What guidance would you propose?

5 MS. CECCOTTI: Well, I would certainly propose
6 guidance to the effect of a definition of the scope.

7 THE COURT: Right.

8 MS. CECCOTTI: Right. And I thought I heard Ms.
9 Lennox -- I couldn't quite hear her too clearly, but to the
10 extent the scope or anything about the scope has changed from
11 the time the motion was filed until today, whatever that
12 is --

13 THE COURT: The scope is an easy one. It's actually
14 inherent in the process.

15 MS. CECCOTTI: Understood, but I guess my point
16 would be as long as we have a clear understanding -- as long
17 as -- the United States Trustee should have a clear
18 understanding of the scope of the committee.

19 THE COURT: Okay.

20 MS. CECCOTTI: It's also appropriate, I think, for
21 the Court to provide guidance concerning the pool, the
22 eligible pool. Is it okay to solicit, particularly in light
23 of what you've heard today, retiree associations,
24 individuals, and unions? And we think the answer to that
25 should be yes, and we --

1 THE COURT: Okay.

2 MS. CECCOTTI: -- think that the guidance would
3 ultimately help the U.S. Trustee devise its procedures and
4 make the process work that much more efficiently. To the
5 extent the Court --

6 THE COURT: So if I gave that guidance, that would
7 effectively be an authorization to the U.S. Trustee to choose
8 among those potential participants however it saw fit?

9 MS. CECCOTTI: With one more piece of guidance, your
10 Honor, which is that -- and anything you'd like to say on
11 funding, we'd be -- by the city we'd be happy to hear that,
12 but that wasn't what I was going to say next. What I was
13 going to say next is to the extent that -- well, not to the
14 extent. Adequate representation is something that we do
15 think the Court should comment upon, and in this case,
16 although it seems like a lot when you say there are 47
17 bargaining units, I would doubt that there will be 47 people
18 clamoring to get on this committee, so the suggestion would
19 be that for adequate representation purposes, any group that
20 wants to participate should be permitted to participate
21 because you can't, practically speaking, for example, ask --
22 tell Unions A, B, and C, who show up ready and willing and
23 able to serve -- you can't say to them as a practical matter
24 there's too many of you; therefore, we're going to have Union
25 A represent the retirees for Unions B and C. So we do think

MR. KARWOSKI: Good afternoon, your Honor. Michael

1 Karwoski. I'm representing myself as an attorney who worked
2 for the City of Detroit Law Department for about 15 years. I
3 retired about a year ago. I draw a pension from the General
4 Retirement System of the city. I can speak to -- I'd like to
5 just address two points briefly because I know it's been a
6 long morning, and we're into the afternoon.

7 Attorneys for the city who are not in management are
8 members of Public Attorneys Association 2211, which is
9 affiliated with the UAW. For the 15 years that I was with
10 the city and a member of that union, the union did not
11 represent the interests of retirees. In fact, there were a
12 number of issues where the union took positions that were
13 adverse to the interests of retirees because it seemed that
14 there's a limited amount of money available in the pension
15 system, and sometimes the active -- the interests of active
16 employees are different than those of retired employees, so I
17 would suggest that in terms of the structure of the
18 committee, that there should be a distinction between
19 retirees who are drawing a pension and those who are -- and
20 employees who are -- former employees or current employees
21 who have vested interests in future retirement benefits,
22 which may be different.

23 I have not seen the list of creditors that the city
24 filed yesterday evening. I believe, as a retiree and someone
25 drawing a pension, I'm probably on -- I'm somewhere in that

1 list of -- in that 3,500-page list.

2 With respect to this motion, the city has given
3 notice to -- on page 16, paragraph 29, it indicates the
4 groups that it's given notice to, and I respectfully -- the
5 last sentence is, "The city submits that no other or further
6 notice need be provided." I respectfully suggest that this
7 is essentially an ex parte motion at this point because the
8 group that has not gotten notice is the group that has the
9 most important interest in this motion, which are the
10 retirees themselves. The groups -- not only have they not
11 gotten notice, but the groups that did get notice have an
12 interest adverse to the retirees. They include the largest
13 creditors, the bondholders, the insurers, the large dollar
14 interests who -- to the extent that pensioners are involved
15 in the bankruptcy process and there's a limited amount of
16 money available to satisfy creditors, the less money that is
17 allocated to retirees through the committee process or
18 otherwise, the more money there is for the larger -- for the
19 other creditors. So the groups that have gotten notice are
20 either the groups that are adverse to the interest of
21 retirees or the unions and the associations, which the
22 discussion that we've had so far, you know, is mixed at best
23 as to whether they have legal authority to represent retirees
24 and whether, in fact, they have interests that are contrary
25 to the interests of retirees.

1 My request is that the Court order that notice of
2 this motion be sent to all of the retirees of the City of
3 Detroit, the 12,000 who are drawing pensions and the
4 approximately 12,000 employees who have either a vested
5 pension or a vested interest in health benefits. It's a
6 large number obviously. It's about 24,000 people, but it's
7 24,000 out of a hundred thousand creditors of the city. And
8 as the city has said, the alleged indebtedness of the
9 retirement system, the \$3.5 billion, is one of the larger
10 debts at issue in this case along with the \$6 billion of pay-
11 as-you-go health benefits.

12 From the standpoint of each individual retiree whose
13 average pension is \$19,000 a year or less, knowing about this
14 process and having the basics of due process, notice and an
15 opportunity to be heard, are as essential or more essential
16 to those retirees as they are to the bondholders, the
17 insurers, the credit swap counterparties, whoever they are --
18 the notice is more important to the retirees because of
19 their -- the importance of their pension to them even though
20 the dollar amount of the individual pensions is small.

21 Stockton, California, which had about 2,000
22 retirees, in the appendix or attachment to its petition
23 listed the 2,000. They listed the individual names. They
24 listed the addresses in care of the pension boards to avoid
25 the privacy issue, which I understand caused the city to

1 withdraw the list that it originally filed. It's certainly
2 doable to do that kind of a mailing, and, in fact, my
3 understanding is that the city has proposed doing a mailing
4 of that type somewhere down the road further in the process
5 using Kurtzman Carson Consultants to do that mailing. It's a
6 day late and a dollar short to do the mailing after the
7 motion has been granted, after the committee has been
8 appointed, after the process has run its course. It makes
9 more sense, I believe, in terms of fundamental fairness, due
10 process, and an opportunity to be heard for the Court to
11 order the city to send the motion to the retirees through
12 Kurtzman Carson, give them a short -- in the notice to the
13 retirees give them a short turnaround time to respond to it.
14 Some will, and some won't. The city somewhat condescendingly
15 on page 13 refers to the retirees as basically a bunch of old
16 fogies who don't know what's going on and wouldn't know what
17 to do with the notice if they got it. I suggest that that's
18 presumptuous on the part of the --

19 THE COURT: All right, sir. Thank you. Who else
20 would like to be heard?

21 MR. KARWOSKI: Thank you, your Honor.

22 MR. TAUBITZ: May it please the Court, Dennis
23 Taubitz appearing on behalf of myself. I'm a retiree of the
24 City of Detroit, and I'd like to make the following comments.
25 I concur with Mr. Karwoski. I believe that this committee,

1 as proposed, would be a denial of the due process rights of
2 the 20,000 retirees. I also believe it's premature. I want
3 to assert that the retirees are not a member of a labor
4 union. They don't pay dues to the union. We don't have a
5 voice in the union. The union, therefore, does not represent
6 the retirees. Further submit that all 20,000 retirees
7 deserve a place at the table. Thank you.

8 MS. GIANNIRAKIS: Good afternoon, your Honor.
9 Again, Maria Giannirakis on behalf of the United -- Daniel
10 McDermott, United States Trustee. Sorry. Your Honor, the
11 United States Trustee does not take a position on the motion
12 here if an appointment of a committee is appropriate, but,
13 frankly, we filed a response to the UAW's -- we filed a
14 statement in response to the UAW's response that was filed
15 yesterday because what they are asking is that if the Court
16 does appoint a retiree committee, that it directs the U.S.
17 Trustee to appoint all labor organizations to that committee
18 or even some labor organizations, and I think other parties
19 have mentioned the same thing in court this morning. This
20 relief is simply not available. 1102(a)(2) states if the
21 Court directs an additional committee to be appointed, the
22 U.S. Trustee will appoint a representative committee.
23 There's nothing that mandates the appointment of a particular
24 creditor. If parties, after a committee is selected, deem
25 that it's inappropriate, 1104(a)(4) provides the relief that

1 they need, but that's not appropriate yet because at this
2 time there's no committee appointed, although the UAW
3 referenced that. Frankly, 1102(a)(4) says if the committee
4 is appointed, after the appointment of the committee the
5 Court directs the U.S. Trustee to appoint, if a party deems
6 that it is not represented on the committee, then it has the
7 right to come back to the Court at that time, and then the
8 Court, if it finds that the committee is not adequately
9 represented, will direct the U.S. Trustee to change the
10 committee composition. The request that the UAW is making is
11 not available at this time and is -- I'm sorry -- and is
12 premature if they're asking the Court to -- they're assuming
13 it's going to be a nonrepresentative committee, and that's
14 not appropriate at this time.

15 THE COURT: If the Court grants the motion, what
16 would be the time frame for the U.S. Trustee to complete its
17 responsibilities?

18 MS. GIANNIRAKIS: Your Honor, we have already
19 started discussions with the city and other parties. We have
20 been working on doing this as quickly as possible if the
21 Court does grant the motion today. In cases where there are
22 exigent circumstances, we have appointed committees almost
23 immediately, in as little as three days. We don't anticipate
24 that'll happen here because it's a complicated case, and we
25 don't think we can quite proceed with that degree of speed,

1 but we will do everything in our power to appoint a committee
2 as promptly as possible and with a view towards all the
3 issues that are arising in this case.

4 THE COURT: Thank you.

5 MS. LENNOX: Thank you, your Honor. I think there
6 are about half a dozen thematic objections that I'd like to
7 respond to in due course. The first is about the motion
8 being premature. This motion is not premature. We do not
9 need to wait for an order for relief to be entered under
10 Section 1102(a)(2) of the Bankruptcy Code under a plain
11 reading of the statute's language. The limiter that suggests
12 that the appointment of a committee should await the entry of
13 an order for relief is only in Section (a)(1). If Congress
14 had wanted that limiter to apply to both Sections (1) and
15 (2), it could have placed the limiter in (a), and then it
16 would have modified both subsections. It didn't do that, so
17 the motion from a statutory basis is perfectly proper and
18 perfectly timely. Moreover, from a practical perspective,
19 your Honor, as many of the objectors themselves have noted,
20 the legacy issues in this case are exceedingly important and
21 complicated, and there's no reason to delay the discussions
22 of them. In fact, discussions of them have already
23 commenced. In fact, it would be irresponsible to delay the
24 appointment of a representative committee for those folks who
25 are not currently at the table.

1 With respect to the Vallejo case that Ms. Brimer
2 pointed out, in that case, to the extent it made any
3 difference to the Court, that was not a case where the debtor
4 moved for a committee. In fact, the debtor opposed the
5 committee in that case. Here we are moving for the
6 committee.

7 Secondly, your Honor, with respect to notice, we do
8 state and we did in our motion and we did give notice to the
9 four retiree associations that are voluntary memberships of
10 currently retired persons that we were aware of. In fact,
11 three of them have shown up today, and one of them claims to
12 represent 70 percent of the folks that are retired, so we do
13 think notice is appropriate. This is a procedural process in
14 which we asked to appoint a committee to represent some
15 folks. This is not a substantive process where we are asking
16 to compromise any claims that retirees may have, so under the
17 circumstances, we believe notice was perfectly appropriate.

18 Third -- and I've stated this before, so I'll just
19 make it clear on the record again -- we are not -- the city
20 is not participating in the selection of members of the
21 committee nor does the city intend to be involved in who the
22 committee selects as its professionals if it is appointed, so
23 we don't believe, as has been alleged in a couple of
24 pleadings, that there's any violation of Local Bankruptcy
25 Rule 2014-2 here.

1 Fourth, with respect to the notations and
2 reservation of rights -- and for this I would like to say
3 that the city does appreciate the thoughtful response that
4 was filed by AFSCME on this issue. It was very constructive.
5 And we do confirm that by this motion the city is not seeking
6 to preclude a creditor or the committee itself, should it be
7 appointed, from weighing in on or objecting to any other
8 substantive issue in this case, including eligibility. We
9 are not asking parties to waive those rights.

10 Fourth, one of the objectors has suggested there
11 should be more than one committee, and we submit there should
12 only be one committee. The retirees in the two pension
13 systems have more in common than not. Each has an
14 underfunded pension. Each gets similar retiree benefits from
15 the city. The legal issues to be addressed are substantially
16 similar, if not identical, but even if that were not the
17 case, your Honor, the whole purpose of having a committee is
18 to bring representatives of differing types of interests but
19 claims of the same legal priority together in one body to try
20 to work out a consensual plan. You know, it's one thing for
21 a committee to negotiate with a debtor, but there are
22 differing interests on a committee. That's the whole purpose
23 of it, and part of being on a committee is so that the
24 creditors can start working out their intercreditor issues as
25 well. We think it's, therefore -- I mean on a normal regular

1 official unsecured creditors' committee, you have bondholders
2 and unions and trade vendors and, you know, a host of people
3 with differing interests. That's the whole purpose of having
4 a committee. So we think it's perfectly appropriate and
5 intended for members with different types of views and
6 interests to sit on one committee, and we think that applies
7 here as well.

8 And then finally, your Honor, this is the punch line
9 that everybody seems to have been waiting for. As many of
10 the objections concede, a Chapter 9 debtor is not required to
11 pay for professionals of the committee. Nevertheless, in
12 light of the special nature of this committee that the city
13 itself has sought, it is the city's current intent to pay for
14 the reasonable fees and expenses of the retiree committee
15 professionals, one committee's professionals. If the
16 committee is formed, the city will have to certainly discuss
17 with the committee itself what's reasonable and rational
18 under the circumstances, and like it's done with its own
19 professionals, the city is going to look to maximize
20 efficiencies and economies among the committee's
21 professionals as well as all professionals in the case. So,
22 accordingly and as most of the objectors have noted, it
23 wouldn't be inappropriate to put that in an order. However,
24 the city did wish to make its intentions known on the record.
25 THE COURT: Thank you. In a few moments, the Court

1 will take under advisement the issue raised by this motion.
2 There is another committee that I think we should think about
3 here. It would be a committee of tort claimants, tort
4 claimants, accident claims, civil rights claims, people who
5 have litigation pending or contemplated to be filed. The
6 merit of this seems to me to be as much procedural as
7 substantive. I think the last thing any of us wants is a
8 flood of motions for relief from stay filed by people with
9 lawsuits against the city to be permitted to pursue those
10 claims, and it seems to me there may be merit in the
11 appointment of a committee for the purpose of working out how
12 those will be handled. They are quite complex because the
13 options of where those cases get resolved is quite wide;
14 right? Under 28 U.S.C. 157(b), you know, personal injury
15 claims can be filed -- or can be tried in the District Court
16 or in the court that they were pending in, and it seems to me
17 that we ought to try to think of some way to manage that
18 potential chaos.

19 MS. LENNOX: May I respond, your Honor?

20 THE COURT: No. Please think about that. I don't
21 need a response right now, but at some point I think we need
22 to think about that issue.

23 MS. LENNOX: Yeah. We have thought about that on
24 many, many fronts about how to handle that. In fact, we have
25 inquiries that have been made of us, and we do have what we

1 believe is a perfectly appropriate process at the right time
2 to resolve those kinds of claims that would not necessitate
3 the appointment of a committee.

4 THE COURT: Okay. All right. Anybody else have
5 anything for today?

6 MS. LEVINE: Your Honor, before you deliberate, can
7 we make one or two comments on the proposed form of order?

8 THE COURT: Yes, please.

9 MS. LEVINE: The order that was filed last night
10 seemed -- Sharon Levine, Lowenstein Sandler. The order that
11 was filed last night seems to have resolved a lot of the
12 issues between the city and the U.S. Trustee, and we
13 appreciate those efforts. Decretal paragraph one, though,
14 says the motion is granted, and we would respectfully submit,
15 as we've seen in a lot of orders in a lot of other cases, it
16 should just say the motion is granted as set forth herein
17 because then it would avoid the conflict with regard to
18 things that haven't been resolved.

19 In addition, at decretal paragraph five there's a
20 retention of jurisdiction which isn't limited with regard to
21 the reservation of rights that we've been discussing on the
22 record, so I just want clarification even if that -- unlike
23 decretal paragraph one, even if decretal paragraph five stays
24 the same, there's an understanding on the record --

25 THE COURT: Yeah. Well, let me just --

1 THE CLERK: All rise. Court is in recess.

2 (Recess at 1:00 p.m., until 1:14 p.m.)

3 THE CLERK: All rise. Court is in session. Please
4 be seated. Case Number 13-53846, City of Detroit, Michigan.

5 THE COURT: The Court concludes that it is
6 appropriate to grant the motion of the city for the
7 appointment of a committee of retired persons. The Court
8 concludes that the objection that this motion is statutorily
9 premature should be overruled.

10 As counsel for the city has pointed out, Section
11 1102(a)(2), which is the section on which the present motion
12 is based, does not require the Court to wait until after the
13 order for relief to appoint a committee. Accordingly, by its
14 plain language, the Court does have the authority to grant
15 this relief, and so that objection is overruled.

16 It has also been argued here that this motion is on
17 inadequate notice because most, if not all, of the individual
18 retirees were not given notice of this motion. The Court
19 concludes that that objection as well should be overruled.
20 This is simply a procedural motion that does not affect the
21 substantive rights of retirees or any other party, for that
22 matter, and, accordingly, the Court concludes that notice was
23 adequate, and that objection is overruled.

24 The Court commends and accepts the city's offer to
25 pay the reasonable expenses of the committee and proposes

1 that all such professional expenses be processed through the
2 fee examiner process.

3 Regarding the issue of scope, it is an important
4 part of the process to define the scope of the committee,
5 and, as noted a moment ago, the Court concludes that the
6 scope of the committee should be to represent the retirees of
7 the City of Detroit. If the Court has any discretion on the
8 issue of whether to give guidance to the U.S. Trustee as to
9 the issue of adequate representation, the Court concludes in
10 this case that it would not be appropriate to exercise that
11 discretion. The Court, rather, concludes that the issue of
12 who should serve on this committee should be left first to
13 the discretion of the U.S. Trustee, and if there are issues
14 or objections to the composition of the committee, there are
15 procedures in place under the Bankruptcy Code to address
16 that, and those issues will be addressed to the extent raised
17 in due course, so the Court will not make any statement on
18 the record at this time on this issue.

19 On the issue of adjusting the dates and deadlines
20 that we discussed earlier on in the status conference to
21 reflect the interest of the committee in participating fully
22 in the process, the Court concludes that that interest can be
23 accommodated by granting the committee a period of time after
24 it selects its attorneys to file objections to eligibility
25 and participate in the discovery as set forth in the proposed

1 dates and deadlines, so the Court will build that extra
2 leeway in for this one participant, so with that on the
3 record, the Court will grant the motion.

4 I do, however, want to address the representative of
5 the United States Trustee's office one more time. Ma'am,
6 would you take the lectern for me? I feel the need to take
7 one more try at pinning you down regarding how long this is
8 going to take because we have a very aggressive and tight set
9 of dates and deadlines here, and so I think it's important to
10 the process that I give your office a deadline as well.

11 MS. GIANNIRAKIS: Your Honor, I appreciate that, and
12 I appreciate --

13 THE COURT: How much time do you need?

14 MS. GIANNIRAKIS: I don't have a specific answer.
15 All I can say is we will --

16 THE COURT: If you don't give me a number, I'll make
17 one up. And honestly, if I do it, it's going to be like
18 arbitrary and capricious and clearly erroneous.

19 MS. GIANNIRAKIS: May I have a moment to consult --

20 THE COURT: And none of us want that, so -- and I
21 don't know whether you're talking about three days, seven
22 days, fourteen days, twenty-one days. I don't know what
23 you're thinking about.

24 MS. GIANNIRAKIS: Your Honor, I don't think -- I
25 don't think it's possible to have a committee up and running

1 in three days, to be honest with you. I mean we will --

2 THE COURT: I wasn't asking you to. What I'm
3 telling you is I don't know what the right answer is. Do you
4 want time to consult with your colleagues?

5 MS. GIANNIRAKIS: I do want time to consult with my
6 colleagues. I do know --

7 THE COURT: All right.

8 MS. GIANNIRAKIS: I do know that we are concerned
9 with giving parties enough time to respond --

10 THE COURT: Um-hmm.

11 MS. GIANNIRAKIS: -- because we are --

12 THE COURT: Right.

13 MS. GIANNIRAKIS: -- we do have retirees here who --

14 THE COURT: Right.

15 MS. GIANNIRAKIS: -- may not have all the electronic
16 methods that we all have to get information.

17 THE COURT: Right. Okay. Fair enough. So I will
18 do the status conference on the Syncora motion while you
19 consult with your colleagues, and then we'll pick this back
20 up again.

21 MS. GIANNIRAKIS: Thank you, your Honor.

22 THE COURT: Okay. Let's do that.

23 MR. HACKNEY: Good afternoon, your Honor. Stephen
24 Hackney on behalf of Syncora.

25 THE COURT: Here's my question for you.

1 MR. HACKNEY: Yes.

2 THE COURT: Given the very restricted role that a
3 court plays in either reviewing the decision of a debtor to
4 assume or reject a contract or the decision of a debtor to
5 settle a dispute, why do you need discovery at all?

6 MR. HACKNEY: So you've anticipated the first part
7 of our argument, your Honor, which was why we filed the
8 statement yesterday to express concerns that we had when you
9 take the proposed order that they have submitted to you and
10 the forbearance agreement and you lay them next to the Orion
11 agreement from the Second Circuit. We have concerns that
12 that order would entail the Court making judicial findings,
13 judicial declarations that could foreclose the rights of
14 third parties, and you see --

15 THE COURT: Okay. If that's your concern, I will
16 assure you at the outset that my decision will be nothing
17 more than to approve the decision of the city to assume this
18 contract and enter into the settlement or disapprove of it.

19 MR. HACKNEY: And that assurance is very helpful I
20 would say at the outset. I would still say, though, your
21 Honor, that this is a sizeable transaction that the city is
22 proposing to potentially assume and perform under. Whether
23 they can perform under it is obviously a subject of dispute
24 that I'll bracket, but whether or not this is within the
25 business judgment of both the city and potentially the

1 service corporation that's also a party to this contract,
2 what claims exactly are being compromised, why they're being
3 compromised now, the likelihood of success, so on and so
4 forth, where the city will get the money to potentially
5 perform under this agreement if it is entitled to perform,
6 bracketing our dispute about that, these are all important
7 questions that are -- unfortunately, they are fact-intensive.
8 And while it is true that the Court must defer to the city's
9 business judgment, to the extent it applies, with a serious
10 question around whether it applies when two of the three
11 parties to the transaction appear to be city officers with
12 duties to the city, the indemnification of the service
13 corporation directors, a number of factual issues, your
14 Honor, that's why we need discovery.

15 THE COURT: Let's assume for a minute -- let's
16 assume for a minute that for any or all or some of the
17 reasons you have identified the city cannot demonstrate that
18 it has exercised appropriate business judgment. Isn't the
19 answer to deny the motion --

20 MR. HACKNEY: I believe --

21 THE COURT: -- rather than grant all this discovery?

22 MR. HACKNEY: I believe it would be, but I need the
23 discovery in order to inquire into that because remember,
24 your Honor, at Syncora we have been excluded from these
25 negotiations, so we do not know what's happened, what

1 meetings were involved, who discussed what with whom. And we
2 also have serious questions about the interaction of the
3 forbearance agreement with the COPs and swap structure that I
4 discussed -- that I mentioned earlier, and so there are
5 ambiguities in the way the forbearance agreement works.
6 There are questions about the necessity of the casino
7 revenues.

8 THE COURT: Okay.

9 MR. HACKNEY: Yeah.

10 THE COURT: Let's focus on ambiguities. If the
11 ambiguities are such that it's not in the best interest of
12 the city to assume this contract or if the ambiguities are
13 such that the Court cannot say that the city exercised proper
14 business judgment in proposing to assume the contract, why
15 doesn't it suit your purposes just to argue the motion should
16 be denied?

17 MR. HACKNEY: I think that's a fair point, your
18 Honor, but it's also very possible that parol evidence may
19 inform the resolution of the ambiguity in a way that leads to
20 informing the Court's decision about whether it should --
21 whether it should deny the motion or not, whether it's within
22 the business judgment or not. I mean, your Honor, we are
23 talking about the city is purporting to use this --

24 THE COURT: What I'm having a hard time doing is
25 reconciling your position on the one hand that the Court in

1 its very limited role here should not make any holdings or
2 findings about what this contract means or does or how it
3 impacts third parties with your interest in discovery on
4 those very questions --

5 MR. HACKNEY: Well, I think that --

6 THE COURT: -- unless you have some ulterior motive
7 because of your other litigation.

8 MR. HACKNEY: And we do not, your Honor. We do not,
9 but we are concerned that the city is going to attempt to
10 wrap itself up in the cloak of the order and say, "Now we're
11 entitled to act consistent with this forbearance agreement,"
12 and so we do have serious --

13 THE COURT: Well, if the motion to assume is
14 granted, it's granted with all of the words and questions
15 about the contract. There's nothing about the assumption
16 process that improves a debtor's position vis-a-vis other
17 parties; right? We all understand that.

18 MR. HACKNEY: I agree, and, your Honor, you are
19 speaking to the large majority of my concerns here, and so
20 I'm trying to react on my feet. I do appreciate it. I also
21 appreciate that you have considered our statement already
22 given the avalanche of information that's filed every week.
23 I guess what I would say, your Honor, is that we have not had
24 very much insight into what led to the forbearance agreement.
25 There are standards under 365 and 9019 that are applicable,

1 and to the extent we do have remaining objections
2 notwithstanding the Court's emphasis of its limited role, we
3 don't believe that we can meaningfully prepare for the
4 hearing without at least some discovery into what happened.

5 THE COURT: All right. I don't see it, so I'm going
6 to ask you to file a response to the motion within 14 days.
7 You can argue that the information that the debtor has placed
8 on the record is not adequate information for the Court to
9 make the judgments that the city is asking the Court to make,
10 and the Court will, of course, take that very seriously,
11 but -- so what I'm proposing is a response by you within 14
12 days and a hearing on the motion at our first omnibus hearing
13 date on August 21st. Any objection to that?

14 MR. HACKNEY: I guess subject to our objection to
15 the fact that our request --

16 THE COURT: Right.

17 MR. HACKNEY: -- for discovery is overruled.

18 THE COURT: Yeah. Apart from that. Sir, did you
19 want to be heard on this matter as well?

20 MR. MARRIOTT: If I might, your Honor.

21 THE COURT: Go ahead, sir.

22 MR. MARRIOTT: Your Honor, Vince Marriott, Ballard
23 Spahr. I'm embarrassed to tell you I cannot pronounce the
24 name of my client. It's also about a paragraph --

25 THE COURT: I'm assuming that's because it's not

1 English.

2 MR. MARRIOTT: That's correct. It's also about a
3 paragraph long. The first two words look like Erste
4 Europaische.

5 THE COURT: Okay. That should be enough for our
6 purposes. Thank you.

7 MR. MARRIOTT: I like to refer to it as EEPK because
8 that's just easier.

9 THE COURT: Okay.

10 MR. MARRIOTT: We filed a preliminary objection to
11 the debtor's motion at Docket Number 246.

12 THE COURT: I saw that.

13 MR. MARRIOTT: And at Docket Number 246 you can see
14 the whole name. Just a couple of additions to what Mr.
15 Hackney said. First, the forbearance agreement, as I think
16 all of the papers indicate, isn't simply about -- or the
17 motion isn't simply about assumption of an agreement. It's
18 also about settlement of certain potentially significant
19 claims that the estate might have against the swap parties
20 either as to the validity of the swaps, the amount that's due
21 under them, the perfection or priority of the --

22 THE COURT: Um-hmm.

23 MR. MARRIOTT: -- collateral interest in the casino
24 revenues, and, you know, the city in its motion basically
25 deals with those issues by saying, you know, they're

1 complicated. They're hard. It would take a lot of time to
2 litigate them, and we don't want to. Nevertheless, one of
3 the justifications for the settlement is that it's \$300
4 million in secured debt and, therefore, to the extent the
5 city can get out from under \$300 million of secured debt so
6 that the collateralization and the amount of the claim -- all
7 of that is significantly relevant to consideration of the
8 motion.

9 When it comes to considering whether a settlement
10 agreement is fair and equitable, I think the Court's role is
11 a little more significant than passing on the business
12 judgment of the debtor in assuming or not a contract. In
13 other words, I think the Court's involvement is a little bit
14 more, and the showing that the debtor has to make is a little
15 bit more substantial to approve a settlement than assumption
16 or rejection of a contract. And at least in our view, your
17 Honor, the forbearance agreement is much more a settlement
18 than it is your -- what you normally would see as a contract
19 that a debtor is seeking to assume or reject. And the fact
20 that the debtor is seeking to assume a settlement agreement,
21 although it's called a forbearance agreement, and the basis
22 upon which it is entering into that agreement impacts what
23 may be significant claims and impacts what may be significant
24 issues for unsecured creditors insofar as either the debt or
25 the swap obligations themselves --

1 THE COURT: Okay. But what I'm hearing from you is
2 the opening paragraph of your argument on August 21st.

3 MR. MARRIOTT: Yes, but I could make that argument
4 better if I had the opportunity to do some discovery and see
5 the documents that relate to the swap agreement, see the
6 documents that relate to the 2009 collateralization and
7 amendment to the service contract.

8 THE COURT: Is there any reason to believe that
9 these documents aren't in this data room?

10 MR. MARRIOTT: They may be in the data room, your
11 Honor, but to get into the data room -- the problem with the
12 data room is it has a lot of things in there that at least at
13 the moment my client is not interested in seeing because the
14 data room may very well contain material nonpublic
15 information that would put my client in a position of perhaps
16 impacting its ability to trade. We don't think any of the
17 documents that we would seek in connection with this motion
18 would be considered material nonpublic information. I think
19 they're public record or could be available through public
20 means, so we would prefer not to have to sign an NDA to get
21 into the data room for a bunch of stuff we don't want. We'd
22 rather make a document request for the limited things we do
23 want that wouldn't create the same issue.

24 THE COURT: Well, all right. I have to say I still
25 don't see it. Whether the debtor can establish the grounds

1 for its motion it doesn't seem to me to depend on anything
2 other than what they assert in their motion and what they
3 offer in court. Now, having said that, as a creditor in the
4 case you're entitled to see any document you like that's
5 related to the financial condition of the city. I said that
6 earlier, and I hope the city will cooperate with you in that
7 regard, but let's hold a hearing on this on October -- I'm
8 sorry -- August 21st. Ms. Lennox or whomever, I should ask
9 you if that date is acceptable to you as well.

10 MR. SHUMAKER: It is, your Honor. Gregory Shumaker,
11 Jones Day.

12 THE COURT: All right. Is 21 -- excuse me. Is 14
13 days enough time to file a response?

14 MR. PEREZ: My name is Alfredo Perez, and I
15 represent FGIC, which is another monoline insurer that's
16 involved in this transaction. Fourteen days is fine if it
17 applies to everybody. Obviously that wouldn't preclude us
18 from arguing that this matter shouldn't be heard at this
19 time, but we can --

20 THE COURT: Right.

21 MR. PEREZ: -- respond in 14 days.

22 THE COURT: Okay. All right. That will conclude
23 that status conference. The Court will enter a scheduling
24 order accordingly. We don't have our U.S. Trustee
25 representatives back here yet. Was there something you

1 wanted to say, sir?

2 MR. SHUMAKER: Yes, sir, your Honor. Again, Gregory
3 Shumaker, Jones Day, for the city. Just one thing that
4 I'm -- I'm sorry.

5 THE COURT: Go ahead, sir.

6 MR. SHUMAKER: I'm sorry. I'd just note that one of
7 my colleagues asked that we ask that the hearing on the 21st
8 be an evidentiary hearing as opposed to just a preliminary
9 hearing. I know it's a formality, but I thought I should
10 raise it.

11 THE COURT: An evidentiary hearing at which what
12 evidence would be presented?

13 MR. SHUMAKER: Well, the evidence in support of the
14 motion.

15 THE COURT: You mean like a witness evidence or --

16 MR. SHUMAKER: Right, exactly.

17 THE COURT: -- or documentary evidence?

18 MR. SHUMAKER: That's right, your Honor.

19 THE COURT: Who would the witnesses be?

20 MR. SHUMAKER: Well, we're not certain of that, but
21 we're sure there will probably be witnesses, including
22 potentially the emergency manager.

23 THE COURT: If I grant that request, does that open
24 the door to discovery by those witnesses or of those
25 witnesses?

1 MR. SHUMAKER: Well, I believe part of our -- the
2 presentation of our evidence is going to involve oral
3 testimony from a witness, so we believe there's probably
4 adequate opportunity for cross-examination, but that is what
5 we were planning, your Honor.

6 THE COURT: All right. Thank you for that
7 information. In light of that -- sir.

8 MR. SMITH: Your Honor, my name is Bill Smith. I'm
9 counsel -- I've learned to be precise about this -- to U.S.
10 Bank in its role as custodian of the casino revenues and as
11 trustee for the certificates of participation. That makes us
12 a party in interest. It's unclear whether we are a creditor.

13 The dialogue you just concluded underscores, I
14 think, a relevant factor. This is, as has been suggested to
15 you by other parties, a complex series of transactions. If
16 the debtor proposes --

17 THE COURT: I remain to be convinced of that.

18 MR. SMITH: I apologize, your Honor. I'm sorry.

19 THE COURT: I remain to be convinced of that.

20 MR. SMITH: We'd be -- well, I'm not certain we
21 oppose the transaction, so I'm not sure I'm the right person
22 to convince you. There are able and capable people who I
23 believe are going to take a yeoman's shot at trying to do
24 that. We believe, in the event that the debtor proposes to
25 present live testimony, it is worthwhile making available to

1 interested parties at least the documents that surround this
2 transaction, some of which are in the data room, some of
3 which are not. And so our suggestion is, to the degree that
4 you are disposed not to grant discovery, that you at least
5 make -- suggest to the city that it make available to any
6 person interested in opposing the transaction the transaction
7 documents themselves. Past that we have no view on
8 discovery, your Honor.

9 THE COURT: All right. Well, the city's suggestion
10 that they are proposing evidence at this hearing does cause
11 me to change my mind about discovery and to allow some
12 limited discovery, so by the same August 21st deadline, the
13 Court will ask the city to file a list of witnesses and a
14 list of documents that it intends to offer at the hearing and
15 to provide those documents to the city. In the two weeks
16 following, the Court will order the city to make available
17 for deposition those witnesses who it intends to call. As a
18 result, we won't have our hearing on August 21st. We'll have
19 it on August 28th. Anything further on this matter?

20 MR. GOLDBERG: What does that do to the response
21 time for the motion?

22 THE COURT: I want responses within 21 days --

23 MR. GOLDBERG: Twenty-one --

24 THE COURT: I'm sorry -- 14 days. Fourteen days.
25 Sorry. Okay. Let's get back to the issue of appointing a

1 committee of retired persons.

2 MS. GIANNIRAKIS: Thank you, your Honor. Thank you
3 for allowing us the opportunity.

4 THE COURT: Sure.

5 MS. GIANNIRAKIS: I was able to consult with my
6 client during that break, and our concern -- and I'll just
7 voice it briefly -- is --

8 THE COURT: Uh-huh.

9 MS. GIANNIRAKIS: -- unlike when we have a list of
10 unsecured creditors, we don't have the body of people that we
11 have to -- well, I guess we do now with 3,500 pages of people
12 to solicit. And although there are parties here that we know
13 are interested and we're going to ask them for information,
14 we don't control how quickly we get those names and that
15 information. We are going to post the questionnaire on the
16 website as soon as it's completed, and that will be done very
17 early, and it'll be available.

18 THE COURT: What website?

19 MS. GIANNIRAKIS: On the U.S. Trustee's Detroit
20 website. I don't have that address, but it's the U.S.
21 Trustee's --

22 THE COURT: U.S. Trustee's website?

23 MS. GIANNIRAKIS: Right. And it'll be very --

24 THE COURT: Do you have any objection to posting it
25 on the city's website and the court's website as well?

1 MS. GIANNIRAKIS: I'm sorry, your Honor.

2 THE COURT: Do you have any objection to posting it
3 on the city's website and the court's website as well?

4 MS. GIANNIRAKIS: Do not, your Honor. As much as it
5 could be out there, we are not opposed to that.

6 THE COURT: Okay.

7 MS. GIANNIRAKIS: And we also know that in addition
8 to that, we're going to be doing mailings, and we're going to
9 have -- we have a body of constituents here that are probably
10 not all technologically savvy, so we want to be mindful of
11 that.

12 THE COURT: Um-hmm.

13 MS. GIANNIRAKIS: So with that said, your Honor, we
14 are going to endeavor to do this as quickly as possible, but
15 we believe we need at least the outline of 21 days.

16 THE COURT: Um-hmm. All right.

17 MS. GIANNIRAKIS: And if we can do it sooner, we
18 will do it sooner.

19 THE COURT: All right. I will set that deadline for
20 you. If there's cause to extend that, you can file a motion,
21 and the Court will, of course, give that every consideration.
22 Anything further for today, or are we done? I just -- I want
23 to make one more statement. Was there something you wanted
24 to say, sir? I didn't mean to cut you off. Okay. Give me
25 one second.

1 This is quite out of the ordinary, but before we
2 conclude I do want to take a moment to thank the United
3 States District Court and its judges for very generously
4 offering us the use of their space and for adjusting their
5 schedules to allow this and future hearings. I also want to
6 thank the clerk of the District Court, Dave Weaver, and the
7 clerk of the Bankruptcy Court, Katherine Gullo, as well as
8 their staffs for their monumental efforts in arranging and
9 setting up all of this. It was an extraordinary challenge
10 with very short notice, and they met that challenge with
11 grace and with expertise and in the very best spirit of
12 public service. And I'd like to break our decorum and ask
13 you to give them a round of applause. And we are adjourned.

14 THE CLERK: All rise. Court is adjourned.

15 (Proceedings concluded at 1:43 p.m.)

INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

August 9, 2013

Lois Garrett

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846
MICHIGAN, .
 . Detroit, Michigan
 . August 21, 2013
Debtor. . 10:02 a.m.

HEARING RE. EMERGENCY MOTION FOR
CLARIFICATION OF THE JULY 25, 2013, STAY ORDER

EXPEDITED HEARING RE. NOTICE OF PENDENCY OF DEFENDANT
SYNCORA GUARANTEE, INC.'S, EMERGENCY MOTION TO DISSOLVE
THE TEMPORARY RESTRAINING ORDER AND CONDUCT
EXPEDITED DISCOVERY

STATUS HEARING RE. CORRECTED MOTION TO ASSUME LEASE OR
EXECUTORY CONTRACT

ADVERSARY PROCEEDING 13-04942 - STATUS CONFERENCE RE.
ORDER GRANTING IN PART AND DENYING IN PART DEBTOR'S
EX PARTE MOTION FOR AN ORDER SHORTENING NOTICE, STAYING
FURTHER BRIEFING AND SCHEDULING AN EXPEDITED HEARING WITH
RESPECT TO MOTION OF DEBTOR CITY OF DETROIT TO SCHEDULE
STATUS CONFERENCE, SET BRIEFING SCHEDULES AND
MAINTAIN STATUS QUO

BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Jones Day
By: DAVID G. HEIMAN
North Point
901 Lakeside Avenue
Cleveland, OH 44114-1190
(216) 586-3939

Jones Day
By: GREGORY M. SHUMAKER
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113
(202) 879-3679

APPEARANCES (continued):

Jones Day
 By: CORINNE BALL
 222 East 41st Street
 New York, NY 10017-6702
 (212) 326-7844

For Robert Davis: Paterson Law Office
 By: ANDREW A. PATERSON, JR.
 46350 Grand River, Suite C
 Novi, MI 48374
 (248) 568-9712

For the State of Michigan - State of Michigan - Assistant Attorney
 Governor, State General, State Operations Division
 Treasurer, and By: MICHELLE M. BRYA
 Local Emergency JOSHUA O. BOOTH
 Financial 525 W. Ottawa Street
 Assistance Loan P.O. Box 30754
 Board in State Lansing, MI 48909
 Case: (517) 373-1162

For Syncora Hold- Kirkland & Ellis, LLP
 ings, Ltd., Syncora By: STEPHEN C. HACKNEY
 Guarantee, Inc., 300 North LaSalle
 and Syncora Capital Chicago, IL 60654
 Assurance, Inc.: (312) 862-2074

For Detroit Honigman, Miller, Schwartz & Cohn, LLP
 Entertainment, LLC- By: JUDY B. CALTON
 Motor City Casino 660 Woodward Avenue, Suite 2290
 and Greektown Detroit, MI 48226
 Casino, LLC: (313) 465-7344

For U.S. Bank: McDermott, Will & Emery, LLP
 By: NATHAN F. COCO
 227 West Monroe Street, Suite 4700
 Chicago, IL 60606
 (312) 372-2000

For David Sole: Jerome D. Goldberg, PLLC
 By: JEROME GOLDBERG
 2921 East Jefferson, Suite 205
 Detroit, MI 48207
 (313) 393-6001

APPEARANCES (continued):

Vanessa G. Fluker, Esq., PLLC
 By: VANESSA G. FLUKER
 2921 East Jefferson, Suite 200
 Detroit, MI 48207
 (313) 393-6005

For Ambac Assurance Corporation: Arent Fox, LLP
 By: CAROLINE TURNER ENGLISH
 1717 K Street, N.W.
 Washington, DC 20036-5342
 (202) 857-6178

For Financial Guaranty Insurance Company: Weil, Gotshal & Manges, LLP
 By: ALFREDO R. PEREZ
 700 Louisiana, Suite 1600
 Houston, TX 77002
 (713) 546-5040

For Detroit Retirement Systems- General Retirement System of Detroit, Police and Fire Retirement System of the City of Detroit: Clark Hill, PLC
 By: ROBERT GORDON
 151 South Old Woodward, Suite 200
 Birmingham, MI 48009
 (248) 988-5882

For Retired Detroit Police Members Association: Strobl & Sharp, PC
 By: LYNN M. BRIMER
 300 East Long Lake Road, Suite 200
 Bloomfield Hills, MI 48304-2376
 (248) 540-2300

For Erste Europäische Pfandbrief-und Kommunalkreditbank Aktiengesellschaft in Luxemburg, S.A.: Ballard Spahr, LLP
 By: VINCENT J. MARRIOTT, III
 1735 Market Street, 51st Floor
 Philadelphia, PA 19103-7599
 (215) 864-8236

For International Union, UAW: International Union, UAW
 By: MICHAEL B. NICHOLSON
 8000 East Jefferson Avenue
 Detroit, MI 48214
 (313) 926-5216

For National Public Finance Guarantee Corporation: Sidley Austin, LLP
 By: GUY S. NEAL
 1501 K Street, N.W.
 Washington, DC 20005
 (202) 736-8041

Court Recorder: Letrice Calloway
United States Bankruptcy Court
211 West Fort Street
21st Floor
Detroit, MI 48226-3211
(313) 234-0068

Transcribed By: Lois Garrett
1290 West Barnes Road
Leslie, MI 49251
(517) 676-5092

Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

1 THE CLERK: All rise. Court is in session. Please
2 be seated. Case Number 13-53846, City of Detroit, Michigan,
3 and Case Number 13-04942, City of Detroit versus Syncora
4 Guarantee, et al.

5 THE COURT: One second, please. Chris. All right.
6 Did someone want to be sworn in?

7 ATTORNEY: Yes.

8 THE COURT: Someone would like to be admitted to the
9 bar of the Court. Step forward, please.

10 MR. COCO: Good morning, your Honor.

11 THE COURT: Good morning. What are your names,
12 please?

13 MR. COCO: Nathan Coco from McDermott, Will & Emery.

14 THE COURT: Mr. Coco.

15 MR. PRICE: Good morning, your Honor. William Price
16 from Clark Hill.

17 THE COURT: Mr. Price.

18 MR. GUADAGNINO: Frank Guadagnino, Clark Hill.

19 THE COURT: What's your last name, sir?

20 MR. GUADAGNINO: Guadagnino.

21 THE COURT: Welcome. Okay. Are the three of you
22 prepared to take the oath of admission to the Bar of the
23 Court? Please raise your right hands. Do you affirm that
24 you will conduct yourself as an attorney and counselor of
25 this Court with integrity and respect for the law, that you

1 have read and will abide by the civility principles approved
2 by the Court, and that you will support and defend the
3 Constitution and laws of the United States?

4 ATTORNEYS: I will (collectively).

5 THE COURT: All right. Welcome. We'll take care of
6 your paperwork for you. You are all set.

7 ATTORNEY: Thank you, your Honor.

8 THE COURT: You're welcome. One second, please. My
9 password is not working here, Chris. All right. Well, let's
10 start. I want to start with the Davis matter, please.

11 MR. PATERSON: Thank you, your Honor. Andrew
12 Paterson on behalf of Robert Davis.

13 THE COURT: And you may proceed, sir.

14 MR. PATERSON: Sir, this is our motion for
15 clarification of your stay order that was entered in July and
16 addressed, as we saw it, three state lawsuits that were
17 included in the stay, although the debtor was not a party to
18 those suits, but they did involve the first or second biggest
19 liability of the debtor, the pension plans. And the
20 definition or the identification of those cases was set forth
21 in the motion, and your order did adopt that.

22 THE COURT: Excuse me one second, sir. Chris, it's
23 working. Go ahead, sir.

24 MR. PATERSON: Since that time, your order has been
25 interposed in our state case up in Ingham County on an open

1 meetings case. It's also been interposed in other matters
2 that I've been involved in, and I'd like to have some
3 clarification as to the extent of that order. I feel that
4 the state proceeding in Ingham County is an open meetings
5 case that has no impact whatsoever directly or practically on
6 the debtor's Chapter 9 protections.

7 THE COURT: Well, let's talk about that. What does
8 your client seek to accomplish by that lawsuit?

9 MR. PATERSON: A declaration from the Court that the
10 Loan Board violated the Open Meetings Act in connection with
11 the appointment of Mr. Orr under Public Act 72 as the
12 emergency financial manager for the City of Detroit.

13 THE COURT: And what does he intend to do with that
14 declaration if he obtains it?

15 MR. PATERSON: The declaration is used in the state
16 court to guide conduct of public bodies, and I will also seek
17 an injunction that they not violate the OMA again, although
18 it's somewhat moot at this point since Public Act 72 has now
19 been repealed by the enactment of Public Act 436 of 2012
20 under which Mr. Orr currently serves and is appointed.

21 THE COURT: Is it your representation to the Court
22 that it is not the intent of your client to use such a
23 declaration to remove Mr. Orr from office?

24 MR. PATERSON: It is, and he did in our reply brief
25 so stipulate that we would not be appealing any such

1 decision. I also indicated to the Court and have brought
2 with me a copy of the transcript from our July 24 hearing
3 before Judge Collette wherein he indicated that he was not
4 going to invalidate any actions taken by the Loan Board in
5 connection with the appointment.

6 THE COURT: Well, I appreciate that, but I want to
7 be sure you understand the very specific question I'm asking
8 you. I get that it is not the intent of your client or of
9 the state court to invalidate any of the actions of the Loan
10 Board or any of the actions that Mr. Orr has taken from the
11 time of his appointment until whenever that judgment might be
12 entered. I've got that.

13 MR. PATERSON: Nor could I seek that relief, nor
14 could the Court grant that under Michigan law.

15 THE COURT: But that's not the question I'm asking.
16 I'm asking is -- the question I'm asking is is it your
17 representation to the Court that your client will not seek to
18 use that judgment to remove Mr. Orr from office in the
19 future?

20 MR. PATERSON: That is, in fact, our stipulation.

21 THE COURT: So if I heard you correctly, what you
22 plan to do with this judgment is to use it to enjoin the Loan
23 Board or others from violating the Open Meetings Act in the
24 future?

25 MR. PATERSON: That is correct.

1 THE COURT: And anything else?

2 MR. PATERSON: No. I mean the relief that I seek is
3 the declaration. I am compelled to ask for an injunction
4 against further violations. It's within the discretion of
5 the state court to issue or not issue that, and then I will,
6 of course, be seeking reimbursement of the attorneys' fees
7 and costs.

8 THE COURT: All right. So the question remaining to
9 be addressed is why shouldn't the order that the Court
10 previously entered be read to stay your suit or the suit
11 where you represent Mr. Davis?

12 MR. PATERSON: Because none of the debtor's assets
13 or property is affected whatsoever by my suit. My suit is
14 against state actors, not against the city. The city is not
15 a party. None of its departments are parties. None of its
16 assets or property is subject to any action by the Circuit
17 Court in my OMA suit. My OMA suit is exclusively against the
18 governor, the state treasurer, and the state Emergency
19 Financial Loan Board.

20 THE COURT: All right. Anything further, sir?

21 MR. PATERSON: No. I would just emphasize that the
22 de facto doctrine does validate all of the acts that have
23 occurred to date, in any event, and there's been no response
24 to that. I mean that is clearly the state law.

25 THE COURT: Thank you, sir.

1 MR. PATERSON: Thank you.

2 THE COURT: Who will be addressing this? Oh, I'm
3 sorry.

4 MS. BRYA: Good morning, your Honor. Michelle Brya
5 and Joshua Booth. We represent the governor, the state
6 treasurer, and the Local Emergency Financial Assistance Loan
7 Board in the state case.

8 It is our position that the scope of your order
9 extending the bankruptcy stay should include the Davis case.
10 In the debtor's motion they specifically requested that it
11 apply to actions against the governor, the treasurer, and the
12 Loan Board that directly or indirectly seek to enforce claims
13 against the city or interfere with the city's actions or
14 activities in the Chapter 9 case. Although the order that
15 was signed by this Court specifically acknowledged the three
16 pre-petition cases, we believe that by the language of that
17 order it said that that language was included for the
18 avoidance of doubt, and it didn't in any way limit the scope
19 of your order to those three cases.

20 The defendants in the state case, the Davis versus
21 Loan Board case, are the exact same defendants that this
22 Court acknowledged in its order, the state treasurer, the
23 governor, and the Local Financial Emergency Loan Board, and
24 Davis seeks to invalidate the emergency manager, and that
25 would clearly interfere with the state's activities in the

1 Chapter 9 bankruptcy case. Until Mr. Paterson filed his
2 reply brief, we weren't aware of his position with respect to
3 the invalidation, but clearly in his prayer for relief in the
4 state case in his second amended complaint he requests a
5 declaration that all decisions of the defendants, including
6 its votes taken at the March 14th Loan Board meeting, are
7 invalidated, and one of the decisions that they made that day
8 was the appointment of Mr. Orr, so we believe that by seeking
9 such relief, Mr. Paterson and Mr. Davis have not withdrawn
10 those claims for the invalidation of the emergency manager,
11 and, therefore, Judge Collette in the state case could still
12 order that invalidation occur and that Mr. Orr's appointment
13 be invalidated. And we believe that that could have a
14 significant impact on the Chapter 9 proceedings, and we're
15 asking that you extend the scope of stay.

16 THE COURT: Suppose the motion were granted with the
17 condition that prohibited that?

18 MS. BRYA: That prohibited the ability for the state
19 court to invalidate the emergency manager?

20 THE COURT: Precisely.

21 MS. BRYA: That would be something that we would be
22 probably comfortable with, your Honor. I mean certainly
23 that's the concern that we have is that if his position is
24 invalidated, then it could significantly impact the City of
25 Detroit and the state in general.

1 THE COURT: It sounds like all Mr. Davis and his
2 counsel want here is a declaration that the Open Meetings Act
3 was violated and attorney fees.

4 MS. BRYA: To some extent I think that that's
5 correct, your Honor, although they still have those claims in
6 their complaint, and so that relief, again, can still be
7 granted.

8 THE COURT: But if my order of clarification limited
9 Mr. Davis to those two forms of relief, you would be
10 comfortable with that?

11 MS. BRYA: Yes, your Honor, I believe we would.

12 THE COURT: All right. Thank you.

13 MS. BRYA: Thank you, your Honor.

14 MR. HEIMAN: Good morning, your Honor. David
15 Heiman, Jones Day, on behalf of the city. As a technical
16 matter, this seems more like a request for relief from stay
17 than clarification, but I'll leave that to your Honor, and I
18 don't -- it matters not to me whether we try to go through a
19 proper process or not in that respect, but I would like to
20 say that we're obviously very concerned about anything that
21 would in any way question the role or authority of the
22 executive decision-maker of the city, and I cannot imagine
23 anything that would be more disruptive to a Chapter 9 case
24 than that. So to just respond to your proposal, if I can
25 call it that, I also have no problem with the suggestion as

1 it relates to Mr. Davis and his counsel, Mr. Paterson. I am
2 concerned, however, about the impact of a ruling that
3 potentially invalidates the -- for the record, invalidates
4 the appointment of Mr. Orr not so much for the party that is
5 making the commitment to your Honor but for the rest of the
6 world and what they do with that, so I think we have to
7 address that. I have no problem with your Honor getting
8 comfortable with whatever works here, but I just want to make
9 sure that we have covered the waterfront in terms of not
10 being exposed to some third party coming in and saying, "Look
11 at that order," so with that --

12 THE COURT: Is it possible -- one second, sir. Is
13 it legally possible to give Mr. Orr and the city that kind of
14 protection?

15 MR. HEIMAN: I would assume -- I'm not a
16 constitutional scholar, your Honor, but I would assume if
17 your Honor issues an order that makes it clear -- and what I
18 think I heard you say is your order would say that, without,
19 again, being technical, the stay will not apply to the Davis
20 lawsuit -- the pending Davis lawsuit so long as the
21 Bankruptcy Court does not move to invalidate the appointment
22 of Mr. Orr.

23 THE COURT: Well, you said "Bankruptcy Court," but,
24 of course, you mean the Circuit Court.

25 MR. HEIMAN: Yes. I'm sorry. Excuse me. I'm

1 sorry. And so --

2 THE COURT: Well, actually my question was a little
3 more specific than that. It was the stay would be clarified
4 to permit Mr. Davis to seek a judgment -- a declaratory
5 judgment under the Open -- that the Open Meetings Act was
6 violated, obviously not finding that. That's not our role
7 here, but a declaratory judgment that the -- seeking a
8 declaratory judgment that the Open Meetings Act was violated
9 and attorney fees, period.

10 MR. HEIMAN: Okay. And if I may suggest that we add
11 to that and that no other party may use any such ruling
12 should it come to pass in any way regarding -- with respect
13 to Mr. Orr's appointment without coming back to the
14 Bankruptcy Court, I think we would be satisfied, so it's --
15 it would, in fact, be a clarification of the stay as relates
16 to Mr. Davis' lawsuit, so I would think we could do that,
17 your Honor.

18 THE COURT: Sir.

19 MR. PATERSON: Yes. I think the Court should be
20 aware that the Open Meetings Act itself I think addresses Mr.
21 Heiman's concern. Section MCL 15.273 reads, "The circuit
22 court shall not have jurisdiction to invalidate a decision of
23 a public body for a violation of this act unless an action is
24 commenced pursuant to this section within the following
25 specified period of time," and then "(a) Within 60 days after

1 the approved minutes are made available to the public by the
2 public body." His appointment was on March 14th. Sixty days
3 have come and gone. No one else can seek to invalidate the
4 appointment of Mr. Orr under Public Act 72 because the
5 Circuit Court would not have jurisdiction.

6 THE COURT: So I take it by that that you wouldn't
7 object to the additional suggestion that Mr. Heiman made
8 here.

9 MR. PATERSON: I would not. It simply restates the
10 law, I think, of the state.

11 THE COURT: Sir.

12 MR. HEIMAN: No. I was good.

13 THE COURT: Okay.

14 MR. HEIMAN: Thank you.

15 THE COURT: Well, in the circumstances, it appears
16 to the Court that we have an agreement as to how this motion
17 should be resolved, so, Mr. Peterson, I'm going to ask you to
18 prepare an order with the three agreed upon conditions here
19 and have it approved as to form by the Attorney General's
20 Office and counsel for the city and then submit it to the
21 Court.

22 MR. PATERSON: Will do. Thank you, your Honor.

23 THE COURT: You're all set, sir. All right. Let's
24 turn our attention to the Syncora matters. I'd like actually
25 first to address the adversary proceeding if that's okay with

1 everyone. Who will be addressing the adversary proceeding
2 for the city?

3 MR. SHUMAKER: I will, your Honor. Gregory Shumaker
4 of Jones Day.

5 THE COURT: Mr. Shumaker.

6 MR. SHUMAKER: Yes.

7 THE COURT: All right. So let's review where we are
8 in the adversary proceeding and where we think we might be
9 going. Okay?

10 MR. SHUMAKER: Certainly.

11 THE COURT: As best I can figure it, Syncora has a
12 motion to dismiss that's pending and fully briefed and needs
13 a hearing date. Yes?

14 MR. SHUMAKER: It's almost fully briefed, your
15 Honor. There's a reply brief from --

16 THE COURT: Reply brief, yes.

17 MR. SHUMAKER: -- the city due I think on the 26th.

18 THE COURT: Okay. There is the city's motion for a
19 protective order. What's the briefing status on that?

20 MR. SHUMAKER: The reply brief was filed by the city
21 recently, and that was in response, if you recall, your
22 Honor, to their emergency motion to dissolve the TRO and for
23 discovery, so we responded by responding to the motion to
24 dissolve and then with a motion for protective order with
25 respect to the discovery they sought.

1 THE COURT: Right. And so then the other motion is
2 the motion to dissolve the TRO.

3 MR. SHUMAKER: That's right, your Honor.

4 THE COURT: All right. Well, my questions for you
5 are what is the city's position on dissolving the TRO, and I
6 ask that with the vague notion that perhaps the TRO has
7 already expired by its own terms, if not by operation of law
8 or rule, and what further relief does the city seek in this
9 adversary proceeding, in any event?

10 MR. SHUMAKER: Well, your Honor, excellent
11 questions. The TRO, of course, by Michigan law typically
12 expires as of 14 days. Judge Berry indicated that the TRO
13 should remain in full force and effect until the Court
14 specifies otherwise. After that happened, the case then got
15 removed, and then it got transferred to your Honor, referred
16 to your Honor, so the TRO has been out there. If you will,
17 we believe that one option for the Court would be under
18 Section 108(b) of the Bankruptcy Code, which allows -- when
19 an order is enforced in a nonbankruptcy proceeding and fixes
20 a period which is -- say it's 14 days -- the city filed on
21 the 13th day. The TRO was entered on July 5th, and the city
22 filed on July 18th. Section 108(b) provides a 60-day, if you
23 will, extension, but I can't tell you, your Honor, that I've
24 got a case on that one, but it is something. But in the end,
25 the TRO has been out there. We know that it is still needed,

1 which has kind of hung up the communications between the
2 parties because we know that Syncora is going to try to
3 capture or try to trap the \$15 million that goes into the
4 lockbox arrangement every month, and so we have been
5 unwilling, without them agreeing to not go after the cash, to
6 agree to a dissolution.

7 THE COURT: But it's your position that the
8 automatic stay --

9 MR. SHUMAKER: Correct, your Honor.

10 THE COURT: -- would prohibit that regardless.

11 MR. SHUMAKER: I don't mean to say what I just said
12 was not relevant because I think it is, but in the end we
13 think since the city has filed that the casino revenues, if
14 you will, your Honor, the tax -- the wagering taxes, are
15 subject to the automatic stay, so the TRO may have run its
16 useful life, but we do believe that the automatic stay would
17 prohibit Syncora from taking the actions that it intends to
18 take.

19 THE COURT: Well, is it -- just procedurally is it
20 your and your client's intent to try to keep this temporary
21 restraining order in effect, if it is in effect, pending this
22 Court's ruling on whether the stay is in effect as to this
23 property?

24 MR. SHUMAKER: Well, your Honor, what we have asked
25 for is that the Court maintain the status quo through the

1 hearing on the assumption motion because the purported
2 consent rights that Syncora is asserting are also -- are
3 going to be ruled upon, if you will, in that proceeding, and,
4 therefore, we see them as very closely connected. And what
5 we would prefer, your Honor, is either an extension of the
6 TRO or -- you know, that's why I raised the 108(b) vehicle --
7 or simply -- I don't think we're asking for the stay. We
8 just noted the stay applies to this property or we believe
9 the stay applies to this property, and Syncora has not moved
10 to -- moved for relief from the stay. And as a result, we
11 would --

12 THE COURT: It contends the stay doesn't apply.

13 MR. SHUMAKER: I'm sorry.

14 THE COURT: It contends the stay does not apply.

15 MR. SHUMAKER: That's correct, your Honor. That's
16 correct, which we disagree with, and I'm more than happy to
17 address those points, your Honor, if you'd like me to, but
18 we -- and they filed a statement yesterday that went into the
19 different reasons why they believe the automatic stay does
20 not apply.

21 THE COURT: Right. I saw that.

22 MR. SHUMAKER: Yeah. Oh, your Honor, one other
23 thing I should raise is not only is the 362 stay out there,
24 but we also believe that there's a stay under Chapter 9 that
25 applies which is 922(a)(2), which would also prevent Syncora

1 from taking post-petition action against the casino revenues
2 which are taxes, and so that would be another vehicle for
3 maintaining the status quo as we believe is necessary.

4 THE COURT: Well, if you got a court order
5 clarifying that the stay does prohibit Syncora notifying U.S.
6 Bank to trap these funds, would that obviate the need for
7 this adversary proceeding altogether?

8 MR. SHUMAKER: I don't -- the remaining aspects of
9 the adversary proceeding would be the tort claims that the
10 city advanced in that initial complaint on July 5th, which
11 were the intentional interference with a contract,
12 intentional interference with an advantageous relationship,
13 so those torts presumably would move forward, but in terms
14 of, you know, the declaration that we sought, at least --

15 THE COURT: Well, but has the city really suffered
16 any damages, assuming those wrongs were committed?

17 MR. SHUMAKER: Well, I think that's something that
18 we would need to flesh out in discovery, but I think that the
19 declaratory --

20 THE COURT: Excuse me, but really?

21 MR. SHUMAKER: Well, your Honor, it's -- those
22 claims are still out there.

23 THE COURT: How long -- how long --

24 MR. SHUMAKER: We would -- we would --

25 THE COURT: How long was the city without the funds

1 because of the trap?

2 MR. SHUMAKER: At least a couple of weeks, your
3 Honor, since June. It's complicated because the --

4 THE COURT: So there may be a bit of damages from
5 that maybe.

6 MR. SHUMAKER: There might be some damages from
7 that, correct, your Honor.

8 THE COURT: Maybe. All right. So what you seek by
9 your request to maintain the status quo pending the
10 resolution of the assumption motion is the explicit or
11 implicit -- I'm not sure which -- order that the TRO
12 previously granted is still in effect.

13 MR. SHUMAKER: That would be fine with us, your
14 Honor.

15 THE COURT: Well, I'm asking what you're requesting.

16 MR. SHUMAKER: Well, I --

17 THE COURT: I'm not offering anything. I just want
18 to know what you want here.

19 MR. SHUMAKER: Well, what I think is -- the fact
20 that the automatic stay applies I believe would prevent
21 Syncora from doing what we believe they want to do.

22 THE COURT: Well, if that's your position, it seems
23 to me you ought to think seriously about consenting to the
24 dismissal of the case. Let me hear from Syncora's counsel.

25 MR. HACKNEY: Good morning, your Honor. Stephen

1 Hackney. It's nice to see you again.

2 THE COURT: Mr. Hackney.

3 MR. HACKNEY: So I think you've gone to the nub of
4 some of the issues, your Honor, because I think what is
5 really trying to happen -- what the city is really trying to
6 have happen here is I think they're uncertain as to whether
7 the stay applies, and they're hoping that they can prop up
8 the TRO as an interim measure where they sort out whether --

9 THE COURT: I sort of asked that, and the answer was
10 no.

11 MR. HACKNEY: And I think that to the point that if
12 they believe the stay applies, then there is certainly no
13 need for the TRO. There will be no irreparable harm going
14 forward because the stay will prevent against that. We have
15 been cards on the table with the Court in terms of expressing
16 our views about the stay because we didn't want to come in
17 here and get the TRO dissolved and then pop up later, so that
18 was part of the reason for the lengthy filings.

19 THE COURT: I read what you wrote about that.

20 MR. HACKNEY: I know you've had a lot of filings,
21 but -- we're not trying to weigh you down unnecessarily, but
22 we wanted to be transparent with you. But I guess from my
23 standpoint, your Honor --

24 THE COURT: Well, let's just ask the question --

25 MR. HACKNEY: Yeah.

1 THE COURT: -- since you are willing to be so
2 transparent.

3 MR. HACKNEY: Yes.

4 THE COURT: If, with the city's consent or without
5 it, the Court dissolves the TRO --

6 MR. HACKNEY: Yeah.

7 THE COURT: -- do you intend to notify U.S. Bank to
8 trap casino funds?

9 MR. HACKNEY: So I think that there are two answers
10 to that question, your Honor.

11 THE COURT: Are they both either yes or no?

12 MR. HACKNEY: Ironically, the first one is that it's
13 important to understand about our position on the legal
14 documents that -- and this is actually very important to the
15 way the collateral agreement works is that it doesn't matter
16 whether we notice U.S. Bank to trap or not. This is very
17 important. So under Section 5.4(a)(3) of the collateral
18 agreement, when there is an event of default of which the
19 custodian is aware -- that's U.S. Bank -- it shall not remit
20 money to the city. And the custodian is aware that there are
21 events of default separate and apart from Syncora's letters,
22 which were merely describing its view of the state of the
23 world, because Mr. Orr himself in his proposal to creditors
24 in his presentation on June 14th said there was, so he
25 created that state of mind in U.S. Bank. That is what led to

1 the conversation that we believe happened, which led to our
2 confirmatory letter that under the normal automatic operation
3 of the collateral agreement cash trapping would occur, so
4 that's why I'm prefacing my question of what will Syncora do
5 because our view continues to be that it doesn't matter
6 whether we take action or not. It's something that happens
7 automatically. So I think the -- as to what will we do, you
8 know, I think the answer is that we've expressed our view to
9 you that we do not believe that the stay applies. We've also
10 attempted to describe to you this machinery embodied in the
11 COP's and the swap and the different types of rights we have,
12 so we believe that we have not only enforcement rights
13 directly under the collateral agreement and the swap
14 agreement but also direction rights to the swap
15 counterparties themselves vis-a-vis their rights under the
16 collateral agreement. And while I can't say definitively
17 today what we will do, I do want to represent to the Court
18 that we believe that we would continue to have those rights
19 notwithstanding the stay, so, in an effort to be responsive
20 to your question, I think it's something we could do, but,
21 more importantly, I think it's something that we do not have
22 to do.

23 THE COURT: So that's a definite maybe.

24 MR. HACKNEY: Yeah. But, your Honor, if I could add
25 something, I mean I'm trying not to argue the merits of the

1 dissolution motion, but I think, as you saw, we have very
2 strong feelings about that TRO. I mean that TRO was granted
3 ex parte, and I won't argue the merits, but I think it's
4 already been in place for -- since July 5th, so I think
5 that's something on the order of 45 days. And now the city
6 is saying we think it should be extended another 60 days, and
7 we don't see the merits of it under the classic test, and we
8 also don't believe that it --

9 THE COURT: Well, 60 days from filing, not from now.

10 MR. HACKNEY: Fair point. Fair point, but -- so I
11 really think that what -- I think that we have to just be
12 candid about what's happening here, and I think this is
13 really about the auto stay. I think it's does the automatic
14 stay apply, and you know what, Syncora, if it does, act at
15 your peril because you could be subject to sanctions if you
16 violate the automatic stay, and, city, you know, if there's a
17 question that the automatic stay doesn't apply -- for
18 example, when the city touted the assumption motion, they
19 were talking about the access to the liquidity they would
20 get. I took that by negative implication to suggest if we
21 didn't do the forbearance agreement, there would be cash
22 trapping. So, city, if there's questions about whether you
23 think the automatic stay applies, it's incumbent upon you to
24 file a motion to extend it, but I wanted to add one last
25 thing, your Honor. I'll try not to go on at length, but when

1 I did the conversation with Mr. Shumaker about our motion to
2 dissolve and asked them whether they would consent, this is
3 what I understood them to say. I understood them to say we
4 will stipulate to dissolution. We're not putting the money
5 back, so we had a disagreement there. But what will happen
6 then is U.S. Bank will go back to trapping cash in the
7 interim, and then I take from their papers that they
8 anticipated that they would have then filed, and so if that
9 had happened, as we believe it should have, given the
10 stipulation, then it would have been clearly on the points of
11 the automatic stay. It would have been does the automatic
12 stay apply or does it not. I don't think that there's
13 anything about the passage of time and the fact that the TRO
14 actually didn't get formally dissolved by Judge Zatkoff that
15 should change the essential nature of that legal question. I
16 think that's the appropriate place to leave the parties
17 rather than having this TRO involved, which then leads to a
18 preliminary injunction hearing which requires discovery and,
19 to my mind, is not the real debate between the parties.

20 One last note, your Honor. The motion to dismiss is
21 not fully briefed because not only do we have to get their
22 response, but I think we also are able to reply.

23 THE COURT: Right. Thank you.

24 MR. HACKNEY: Thank you.

25 THE COURT: Well, before you sit down, let me just

1 ask you procedurally whether you are willing to take on in a
2 formal context in this Court and on an expedited basis the
3 extent to which the stay applies to any of the rights you
4 think your client has in the circumstances.

5 MR. HACKNEY: Yeah. So if the TRO were dissolved
6 and we shifted the focus to where we think it was -- where it
7 should be, I would absolutely work with counsel and with the
8 Court to move through an expedited process of resolving the
9 status of the stay, and so if I'm right and cash is trapped
10 in the interim, it would only be the amount of cash that's
11 trapped while that issue is resolved, and we would absolutely
12 work with the Court to meet any schedule you set. You can
13 see we've done work on it already, so --

14 THE COURT: Yes. You've briefed it extensively
15 already.

16 MR. HACKNEY: Yeah.

17 THE COURT: Ms. Calton, did you want to be heard?

18 MS. CALTON: We're representing Defendants Detroit
19 Entertainment, LLC, which is the Motor City Casino, and
20 Greektown Casino, LLC, and I think with respect to what
21 you're discussing today, our desire is pretty easy. We want
22 whatever order is entered to be very clear where we're
23 supposed to pay the money so that we're at no risk of ever
24 having to pay it a second time.

25 THE COURT: Right.

1 MS. CALTON: Okay.

2 THE COURT: I don't think anyone could object to
3 that. One more, sir.

4 MR. COCO: Yes, your Honor. Good morning again.
5 Nathan Coco on behalf of -- on behalf of U.S. Bank in its
6 capacity as custodian under the collateral agreement. Your
7 Honor, as we noted in our response brief that was filed some
8 time ago, U.S. Bank in this capacity is simply a custodian.
9 It is not U.S. Bank's role or discretion under the agreement
10 to decide whether or not there's an event of default, and,
11 you know, there's obviously a live dispute about whether or
12 not the stay applies, whether or not the cash should be
13 trapped or must be trapped. U.S. Bank in this dispute is
14 simply seeking clarification one way or the other. We are
15 trying to avoid a situation much like the casinos where we're
16 subject to conflicting instructions from the city and from
17 Syncora and, you know, are forced to separately seek the
18 Court's decision-making authority on those issues, so --

19 THE COURT: That's a bit inconsistent from what I
20 heard Mr. Hackney say. He said you have obligations once you
21 are aware of a default.

22 MR. COCO: And there is a dispute about whether or
23 not there is an event of default --

24 THE COURT: All right.

25 MR. COCO: -- as I understand it because --

1 THE COURT: That's a different question.

2 MR. COCO: -- because the swap counterparties
3 haven't officially declared a default, but I just want to
4 make sure the record is clear. U.S. Bank is not taking a
5 position that there is or is not. It's an issue that's been
6 presented to the Court by the parties who have an economic
7 interest in this dispute. We just seek clarification to make
8 sure that we're not put in an untenable situation where we're
9 forced to reconcile two conflicting directions.

10 THE COURT: Fair enough, sir. Thank you.

11 MR. COCO: Thank you.

12 MR. SHUMAKER: Your Honor, if I may, briefly. Mr.
13 Hackney was talking about how the collateral agreement works.
14 Of course, your Honor realizes that Syncora, the swap
15 insurer, is not a party to the collateral agreement and not a
16 third-party beneficiary. There's no clause in that agreement
17 nor has there been any default on the swaps payments by the
18 city. And we fundamentally disagree on this position as to
19 whether there is automatic cash trapping of the casino
20 revenues. Mr. Hackney referred to a conversation between Mr.
21 Orr and U.S. Bank. U.S. Bank has filed a paper disavowing
22 Syncora's version of those events, and we strongly believe
23 that the only parties that can -- the only entities that can
24 declare an event of default are the actual parties to the
25 collateral agreement. That would be the swap counterparties

1 and not Syncora.

2 THE COURT: Well, let me ask you the same question
3 that I asked of Mr. Hackney. Are you and your client
4 prepared to address the issue of whether the automatic stay
5 in this case acts to prohibit Syncora from enforcing any of
6 the rights that it thinks it has under whatever the
7 agreements are here?

8 MR. SHUMAKER: Your Honor, I think we would be more
9 than happy to do that. We believe that it would be -- the
10 burden of proof would be incumbent upon Syncora to show that
11 they were entitled to that relief, but the only other thing I
12 would share, your Honor, is that we would still ask that the
13 Court prohibit the -- Syncora from taking steps to get at the
14 city's property, the casino revenues, which are so vital to
15 the city. I mean we're talking if they take actions vis-a-
16 vis U.S. Bank --

17 THE COURT: Well, all right. Fair enough. Let me
18 just put the schedule question to the two of you. I'm
19 available today or we have a hearing -- a regularly scheduled
20 hearing for next Wednesday. We could do it then or some
21 other time. What suits you? Do you want a moment to consult
22 with your --

23 MR. SHUMAKER: If I might.

24 THE COURT: -- staff there? Sir.

25 MR. SHUMAKER: Your Honor, we would be willing to do

1 it on an expedited basis over the next week for the August
2 28th hearing if we were able to have the status quo
3 maintained in some fashion.

4 THE COURT: Sir.

5 MR. HACKNEY: Your Honor, I think that in late June
6 when we thought that we were negotiating an NDA with the city
7 in order to make a proposal if the --

8 THE COURT: Negotiating what?

9 MR. HACKNEY: Negotiating an NDA with the city.
10 That's what we thought we were doing on July 3rd.

11 THE COURT: I'm sorry. Negotiating what?

12 MR. HACKNEY: A nondisclosure agreement. I'm sorry,
13 your Honor. Don't mean to be overly familiar. If they had
14 asked us back then, "Hey, will you stand still while we
15 negotiate this nondisclosure agreement, see if we can work it
16 out, make a proposal?" there might have been a different
17 willingness on behalf of my client to voluntarily stand
18 still, but I think -- I'm not authorized to say that we will
19 voluntarily stand still, your Honor. I certainly will say
20 that we're happy to show up and argue this on August 27th,
21 August 28th if that works with the Court's schedule. My
22 personal view is this TRO, there's not a lawful basis to
23 maintain it for a variety of reasons, and I just don't think
24 that we can just use it as this interim measure. I don't
25 think a week's worth of cash trapping is going to cripple the

1 city, and so -- and by the way, if the TRO stays in place,
2 then you have the preliminary injunction, and we have to
3 schedule the discovery. It's just -- I don't think it's an
4 efficient way to proceed, but we certainly will show up and
5 argue this next week if you'd like us to. I'm not even
6 sure -- I will have to say I'm not even sure when the city
7 gets the next payment discharged from the general receipt
8 subaccount, so I don't know if they're going to --

9 THE COURT: Anybody have an answer to that question?

10 MR. SHUMAKER: I'm sorry, your Honor. I'm sorry. I
11 missed the question.

12 MR. HACKNEY: He wants to know when the next release
13 is to the city.

14 THE COURT: When is the next release from the
15 subaccount?

16 MR. SHUMAKER: It should be on or about the 26th,
17 your Honor.

18 THE COURT: 26th of this month?

19 MR. SHUMAKER: Yes, your Honor.

20 MR. HACKNEY: I was hoping it was.

21 THE COURT: So it's before next Wednesday.

22 MR. HACKNEY: I didn't know if U.S. Bank might know
23 the precise answer to that because it builds up, and then it
24 discharges to them, and so if it wasn't even going to
25 discharge, there is more time, so --

1 THE COURT: Right. Well, I wonder, Mr. Shumaker, if
2 it isn't in the best interest of all concerned to reconvene
3 later this afternoon and have argument on this question.
4 It's certainly been briefed in various filings that the two
5 of you have made. I'm prepared.

6 MR. SHUMAKER: Your Honor, we got their papers
7 setting forth their arguments yesterday, and --

8 THE COURT: Of course you did, but none of it was
9 any surprise to you.

10 MR. SHUMAKER: Well, in terms of their positions on
11 the automatic stay, I believe there were some things in there
12 that were brand new, and we've --

13 THE COURT: Okay.

14 MR. SHUMAKER: You know, I believe that if your
15 Honor believes that's the only way to do it, that's what
16 we'll -- that's what we'll do. We would hope that there
17 would be -- because the automatic stay is in place, we
18 believe, presumptively, that we could do this on --

19 THE COURT: My concern with your relying on the TRO
20 is twofold. I'm not confident, as a matter of law, that it
21 is still in place. I don't know. Second, I'm not
22 comfortable imposing one without all of the process that
23 Rule -- I think it's 65 of the Federal Rules of Civil
24 Procedure requires, which we have not -- or you have not
25 invoked, so I think it's in the city's best interest to get

1 this matter resolved very promptly, and I think it's also in
2 Syncora's best interest, too, because, you know, there's
3 money coming in, and there's money going out.

4 MR. SHUMAKER: And we will do it today then, your
5 Honor.

6 THE COURT: I suppose we could reconvene tomorrow if
7 you think 24 hours will be necessary to help you prepare for
8 it, but, in the meantime, there are risks, right --

9 MR. SHUMAKER: Your Honor --

10 THE COURT: -- and to consult with your people and
11 let me know what you want to do.

12 MR. SHUMAKER: This afternoon is fine, your Honor.

13 THE COURT: This afternoon is fine. Okay. Is that
14 all right with you, sir?

15 MR. HACKNEY: Absolutely.

16 THE COURT: What time would either of you suggest?
17 May I suggest three?

18 MR. SHUMAKER: Three o'clock?

19 MR. HACKNEY: You bet.

20 MR. SHUMAKER: That's great.

21 THE COURT: All right. At three o'clock we will
22 have an oral argument on the issue of whether the automatic
23 stay of either 922 or 362 stays Syncora's enforcement of any
24 of its rights under any of the applicable agreements.

25 MR. HACKNEY: And, your Honor, did you have a view

1 on the dissolution motion and whether we should argue its
2 merits, or is the TRO going to be dissolved?

3 THE COURT: Well, my thought there was to wait and
4 see what the outcome of the stay motion was.

5 MR. HACKNEY: Okay.

6 THE COURT: If the answer to that is there is no
7 stay or it's a limited stay or whatever, then the city may or
8 may not decide to pursue a TRO, and we'll have to figure out
9 how to do that. If the answer is, yes, the stay applies,
10 then I think the city would agree to dissolve the TRO and
11 maybe even dismiss the lawsuit. So is that okay to hold off
12 on that?

13 MR. HACKNEY: Absolutely. The only reason I'm
14 asking is we do technically have a status conference today on
15 the adversary that would normally involve scheduling of
16 things like the preliminary --

17 THE COURT: Right. So let's hold off on that.

18 MR. HACKNEY: Understood. Your Honor, I just want
19 to make one more technical note on the adversary -- on the
20 adversary proceeding just before we leave the podium, which
21 is it's not precisely before you, but I think one thing that
22 we'll have to do is clarify the precise nature of the Court's
23 jurisdiction. There were competing theories of jurisdiction
24 offered to Judge Zatkoff, and Judge Zatkoff merely held that
25 he did have jurisdiction. And I wanted to flag this with you

1 as a potentially important issue to things like mandatory
2 abstention and so forth under Section 1334. It's not before
3 you. I'm merely raising it with you in the means of a status
4 to let you know that we think that may be an issue that has
5 to be resolved.

6 THE COURT: Can you be a little more specific for
7 me?

8 MR. HACKNEY: I sure can. When we removed the case,
9 we asserted that the casino defendants had been fraudulently
10 joined, and in doing so we represented that diversity
11 jurisdiction existed that supported removal. By the time
12 Judge Zatkoff asked for clarification of this, the bankruptcy
13 had intervened, and they filed a motion that said it doesn't
14 matter anymore whether there was removal, and maybe there was
15 diversity jurisdiction. They hedged a bit, but they said now
16 there's related-to jurisdiction.

17 THE COURT: Okay.

18 MR. HACKNEY: So that's good enough for him, but I
19 think for you it will be important for you to decide whether
20 you have either or both and so on and so forth. I'm just
21 making that point now.

22 THE COURT: All right.

23 MR. HACKNEY: Thank you, your Honor.

24 THE COURT: Sir.

25 MR. GOLDBERG: Very briefly --

1 THE COURT: Sir.

2 MR. GOLDBERG: What I'm hearing is that the
3 hearing -- the expedited hearing you're talking about is a
4 hearing on whether the automatic stay applies to post-
5 petition release of the casino tax dollars. Is that correct?

6 THE COURT: Yes, among other things.

7 MR. GOLDBERG: I mean I just want to call attention
8 that in -- I represent party of interest David Sole. We
9 filed an objection to the approval of the forbearance
10 agreement. One of the central arguments in our objection,
11 which we did brief, was --

12 THE COURT: Excuse me, sir. Could you just state
13 your appearance on the record?

14 MR. GOLDBERG: I apologize. Jerome Goldberg, and
15 I'm appearing on behalf of interested party David Sole. We
16 did file an objection to the city's motion for approval of
17 the forbearance --

18 THE COURT: Right.

19 MR. GOLDBERG: -- agreement, and one of the things
20 that we did brief in the objection -- and it goes to the core
21 of our objection -- is whether or not the automatic stay does
22 apply to the -- based on Section 922 and Section 928. And we
23 would appreciate at least consideration going to the
24 arguments we raised in the brief, which we took some time to
25 raise, and --

1 THE COURT: Okay. We will look at that, and if
2 you'd like to be heard this afternoon at three o'clock,
3 that's fine with me as well.

4 MR. GOLDBERG: My problem this afternoon is my wife
5 has cancer surgery next Wednesday, and she does have an
6 important appointment with the doctor. I'm available
7 tomorrow morning to be heard, but I could not be available
8 today.

9 THE COURT: Right.

10 MR. GOLDBERG: But I would appreciate this because
11 we feel it is a very -- we feel this whole issue is a major
12 issue because it deals with interest rate swaps, which we
13 briefed, and that's a -- we're talking about tons of money
14 going to these banks and for what we believe is very little
15 socially useful, but I'm not going to argue our argument
16 there, but obviously the question of whether or not the city
17 is going to have to pay the money goes to whether it's a
18 secured loan. It goes to the status within bankruptcy, and
19 it goes to whether -- it goes to the efficacy and the
20 necessity for this forbearance agreement and any benefit to
21 the city and to the -- against the interest of other
22 creditors like my clients, who are pensioners, who will see
23 less funds available for their pensions because the money is
24 going to the banks when the money does not even have to go to
25 the banks, so I would like to be heard on this question, but

1 I know I'm not available at three o'clock. If there's no
2 other way to reschedule, I appreciate the -- I would at least
3 appreciate that my brief be considered, be looked at. We
4 took time doing it. We feel there are very valid arguments
5 on why the automatic stay does not apply -- I mean does
6 apply -- my apology -- does apply, and, you know, if there's
7 going to be post-briefing on it, we'd like to be involved in
8 that as well.

9 THE COURT: All right, sir. You have my commitment
10 to review that part of your briefs for this afternoon's
11 hearing. Thank you.

12 MR. GOLDBERG: I appreciate it. And it's Docket
13 361.

14 THE COURT: Oh, okay. Thank you. All right. The
15 other item that's on the agenda is a status hearing on the
16 motion to assume the executory contract, the forbearance
17 agreement. Is there anything that anyone would like to bring
18 up in that regard?

19 MR. SHUMAKER: Yes, your Honor. Gregory Shumaker
20 again for the record. Your Honor, last time we met on August
21 2nd, you'll recall that Syncora had asked for a significant
22 amount of discovery relating to the assumption motion. At
23 the end of the hearing, I had informed the Court that the
24 city planned on putting on one or two witnesses for -- at the
25 hearing, and your Honor then ordered that there be -- that

1 depositions of the debtor's witnesses and any exhibits that
2 it proposed to proffer take place. The city did do that on
3 Friday, I believe, and designated three witnesses and put
4 forth its exhibit list and has, in fact, given copies of all
5 of those exhibits pursuant to your order.

6 Syncora has put forth a witness list of ten
7 witnesses, one of whom overlaps, and that's the emergency
8 manager. We've got -- your Honor has set the end of next
9 week for the end of those depositions. We were wondering,
10 your Honor, if that was what you had envisioned for the
11 hearing, that there would be multiple other witnesses. As
12 your Honor knows, it's not supposed to be a mini trial. We
13 want your Honor to be -- you know, have everything it needs
14 to be informed -- fully informed, but that puts into some
15 sort of question the length of the hearing perhaps. I don't
16 know if, you know, September 9th -- if 13 witnesses can be
17 put on that day, but, in any event, we wanted to raise that
18 as a status conference and get your guidance on that and then
19 also sort of the length of the depositions. We have 13
20 objectors on the assumption motion. We'd ask for
21 clarification from your Honor that whatever depositions go
22 forward be limited in length and perhaps that the objectors
23 be asked to coordinate in terms of their timing so there's no
24 duplication of effort for the parties.

25 THE COURT: What limit would you suggest?

1 MR. SHUMAKER: Well, your Honor, you know, a lot
2 of -- I don't know exactly with regard to the Syncora
3 witnesses how long those would take. I was hoping with
4 regard to the three witnesses that the city had put forth,
5 including the emergency manager, given all that's going on,
6 that those be depositions of a half day in length.

7 THE COURT: Thank you, sir.

8 MR. HACKNEY: Stephen Hackney on behalf of Syncora,
9 your Honor. So the first thing I want to say is that the
10 order didn't require us to identify witnesses or disclose
11 documents, but we thought it would be safer to identify any
12 potential rebuttal witnesses now.

13 THE COURT: Well, the reason for that was because
14 you didn't tell me at the last hearing that you intended to
15 call any witnesses.

16 MR. HACKNEY: And I don't have a present intention.
17 It's not a will call list. I mean I don't know what the
18 city's witnesses are going to say in their depositions. I
19 have their affidavits. I have a sense of what they're going
20 to say, but there is water under the bridge yet. We just did
21 it earlier rather than later rather than doing a rebuttal
22 witness list after we take the depositions. That's all we
23 did. I don't have a present intention to call witnesses. I
24 will say I don't fully know enough about the city's case-in-
25 chief on the assumption motion to make that decision. That's

1 a nuance decision. I don't anticipate putting on hours of
2 testimony from Syncora or its financial advisors. I will
3 tell you that four of the names on the list are the service
4 corporation directors who are -- is a party to the
5 forbearance agreement, so those were names that we put on the
6 list as well as potential percipient witnesses. And then we
7 identified a bunch of documents as well, so I'm not -- it's
8 not my intention to hijack your assumption hearing. I agree
9 with the statement that a Court can't resolve third-party
10 rights in the context of assumption or 9019, so it's within
11 the context of that guidance that the Court gave that we
12 were -- that we submitted this list.

13 THE COURT: Are the depositions of the three city
14 witnesses scheduled?

15 MR. HACKNEY: They aren't scheduled, your Honor.
16 Well, that's in part because I didn't want to just fire out a
17 notice and then claim all the seven hours to myself. I've
18 been trying to coordinate and have already had communications
19 with the other objectors, some of them. Our intention is to
20 coordinate a call tomorrow so that the depositions can be as
21 orderly as possible in terms of not having a merry-go-round
22 of attorneys asking questions. And if we can do that, we
23 will, but the one thing I'll say, your Honor, is we won't be
24 able to get the depositions done, I doubt, with all of the
25 objectors in a half day. I think all of the objectors means

1 that we'll need the full seven hours for sure.

2 One last point on the matter of status, your Honor.

3 THE COURT: I don't quite get that given the
4 relatively narrow scope of the issues and the hearing.

5 MR. HACKNEY: I guess, you know, I won't reargue our
6 last interaction with each other on this subject. I guess I
7 will just say that this is a very complicated structure, and
8 the implications of the forbearance --

9 THE COURT: Of course that's true, but nobody argues
10 about the structure. The structure is what it is. It's in
11 the documents.

12 MR. HACKNEY: Agreed; agreed. But I also think the
13 implications, the analysis of the structure, of the city's
14 need for cash, of the validity of various things, is a
15 factual question that I know different objectors are going to
16 want to inquire --

17 THE COURT: All right. But that's a different
18 question than the question of the structure.

19 MR. HACKNEY: That's a fair point. It's just that
20 the complexity of the structure bleeds over somewhat into the
21 factual inquiry we do need to make in terms of have they run
22 their traps properly in order to try and get this deal
23 approved because they are contending that this will lead to
24 performance, so -- and, your Honor --

25 THE COURT: You're talking about 21 hours of

1 depositions just on the city's side in a hearing that I was
2 thinking of allocating each side three hours to try.

3 MR. HACKNEY: With the objectors grouped as a class?
4 Well, remember, your Honor, I think that I will say part of
5 the value of the depositions happening outside of the
6 courtroom is that it streamlines the presentation before the
7 Court. I mean cross-examination gets a lot crisper when you
8 have the time to clarify and there's not as much fumbling
9 around in the courtroom, so I'm not sure that the deposition
10 will run contrary to your desire to run a tight hearing. I
11 think it may accentuate it.

12 THE COURT: Thank you, sir. Does anyone else want
13 to be heard on these issues?

14 MR. HACKNEY: Your Honor, if I could raise --

15 THE COURT: Oh, is there more?

16 MR. HACKNEY: I'm sorry.

17 THE COURT: I'm sorry. I'm sorry.

18 MR. HACKNEY: No. That's okay. I try not to go on
19 at length. I wanted to clarify one thing. There's been
20 these repeated references to the data room as being something
21 that they've provided to us, and I just want to confirm that
22 it is being deemed discoverable and responsive to our
23 requests. The reason for this is important. Everyone had to
24 sign an NDA to go into the data room meaning --

25 THE COURT: Nondisclosure agreement. Got it.

1 MR. HACKNEY: Nondisclosure agreement. I'm going to
2 write that on my forehead this evening so --

3 THE COURT: No, no, no.

4 MR. HACKNEY: -- I see it every time I look in --

5 THE COURT: You can use the letters from now on.

6 MR. HACKNEY: Yeah. No.

7 THE COURT: I got it now.

8 MR. HACKNEY: I will try to be less euphemistic.
9 I'm sorry. Under the nondisclosure agreement, you can't
10 disclose the information from the data room in court, to
11 witnesses, et cetera, unless the city agrees with you that it
12 is discoverable by other means, in which case now it can be
13 used in court proceedings. I think that that's happened, and
14 I just want to clarify that that's happened because that's
15 going to facilitate depositions, filing of briefs before the
16 Court, and the execution of this hearing and a bunch of other
17 ones before you. I don't think they put any privileged
18 information in that room, so there's -- it's financial
19 information of the city, so I think it should be
20 discoverable.

21 THE COURT: All right. I will get around to putting
22 that question to the city.

23 MR. HACKNEY: Thank you.

24 MS. ENGLISH: Good morning, your Honor. Caroline
25 English from Arent Fox. We represent Ambac, and we filed an

1 objection. We, like Syncora, also at this point do not
2 anticipate the need to put forth rebuttal witnesses and
3 exhibits at the September 9th hearing, but based on what we
4 hear from the city's witnesses during depositions, it's
5 possible, and so we would like to request that a schedule be
6 entered allowing us after the conclusion of those depositions
7 to disclose any rebuttal witnesses and exhibits we might like
8 to offer during the evidentiary hearing and then allow the
9 city, if necessary, to depose our witnesses as well. I'll
10 also --

11 THE COURT: That would require that the depositions
12 take place like tomorrow, all three at the same time.

13 MS. ENGLISH: Well, I think we have an extra week
14 built in. The depositions of the city witnesses are supposed
15 to conclude by August 30th, I believe, and I think the
16 trial -- or the hearing is the 9th, so we do have the week of
17 Labor Day. We could squeeze in some extra depositions if
18 necessary. Again, we don't anticipate that it'll be
19 necessary, but we couldn't say for sure, and we need to
20 reserve the right to call any witnesses as we see fit after
21 we depose the city's witnesses.

22 THE COURT: All right. Thank you.

23 MS. ENGLISH: Thank you.

24 THE COURT: Sir.

25 MR. PEREZ: Good morning, your Honor. Alfredo

1 Perez. I represent FGIC. Your Honor, in connection with our
2 limited objection, we did file two declarations. One was my
3 declaration just attaching the documents that we relied on,
4 so I don't think that's an issue, but we did file a very
5 short declaration for Stephen Spencer on kind of two issues,
6 and that would be our direct testimony of him to the extent
7 the hearing goes forward. So I don't know if anybody wants
8 to question him about that, but that -- you know, those two-
9 or three-page declaration would be our direct testimony of
10 him.

11 THE COURT: If you haven't already, perhaps you
12 could work with the city on seeing if they would be willing
13 to have that declaration be admitted in lieu of testimony.

14 MR. PEREZ: Okay. I will do that, your Honor.

15 THE COURT: Would anyone else like to be heard?

16 MR. GORDON: Good morning, your Honor. Robert
17 Gordon of Clark Hill on behalf of the Detroit Retirement
18 Systems. I just thought this might be the right time to echo
19 the sentiment of Mr. Goldberg. I don't know what's going to
20 get argued in oral argument regarding the stay this
21 afternoon, but we did in our papers raise the issue of
22 whether the lien asserted by the swap participants actually
23 extends to the post-petition casino revenue, so there could
24 be an issue there relative to whether there would be a basis
25 for even arguing whether the stay applies or doesn't apply,

1 so we just want to make sure that the Court is aware of that.

2 THE COURT: Thank you.

3 MR. GORDON: Thank you very much, your Honor. And
4 other than that, I echo Mr. Hackney's suggestion that all
5 objectors would somehow in a very efficient way hopefully be
6 able to participate in the same discovery so no one is
7 duplicating each other. Thank you.

8 MS. BRIMER: Good morning, your Honor. Lynn M.
9 Brimer appearing on behalf of the Retired Detroit Police
10 Members Association. Your Honor, we filed a limited
11 objection chiefly concerned that, as the Court is aware,
12 there was a retiree committee formation meeting yesterday.
13 The committee was -- will be appointed at the request of the
14 city, and to just request that the Court ensure whatever
15 scheduling order the Court puts in place takes into
16 consideration the opportunity for committee and committee
17 counsel to address these what are going to be ultimately very
18 significant issues to the ability of the city to honor its
19 pension obligations.

20 THE COURT: Thank you for reminding me of that.

21 MR. MARRIOTT: Good morning, your Honor. Vince
22 Marriott, Ballard Spahr, on behalf of EEPK. If you remember,
23 they're the unpronounceable --

24 THE COURT: I do.

25 MR. MARRIOTT: I rise only to address the notion

1 that it would be half-day depositions as opposed to full-day.
2 Not all of the objections raise the same issues. I mean
3 there is some overlap, but there's also some independent,
4 depending upon who's objecting --

5 THE COURT: Right.

6 MR. MARRIOTT: -- so that it is not as though a
7 single lawyer could be designated to handle all of the
8 questioning, so I think that given the lack of overlap among
9 the objections, I think a full day would be appropriate, not
10 half. Thank you.

11 THE COURT: Thank you, sir.

12 MR. GOLDBERG: Your Honor, Jerome Goldberg appearing
13 again on behalf of Mr. Sole. We also did file a declaration
14 with our objections of the declaration of David Sole based on
15 a thorough review of the swap documents based on a previous
16 FOIA we had done, and if -- we are very amenable to that
17 declaration being entered in lieu of any testimony and will
18 check with -- as you instructed the other attorneys, we could
19 check with the others. If they want to talk to -- depose Mr.
20 Sole, we would clearly make him available.

21 THE COURT: All right.

22 MR. GOLDBERG: If I could maybe visit one issue, and
23 I apologize for -- I sat thinking about this. I am available
24 tomorrow morning to be part of this argument on the automatic
25 stay, which I think is a very important argument, and if

1 there was any way to reschedule -- I just am absolutely not
2 available this afternoon. I'm pledged to -- family comes
3 first obviously, but I could make myself available tomorrow
4 morning or Friday for the argument on the stay if that's
5 possible. Thank you.

6 THE COURT: Well, I certainly appreciate your
7 interest in this issue and your client's, of course, and your
8 personal circumstances, but I think it is in the best
9 interest of all concerned to proceed this afternoon, so
10 that's what we're going to do.

11 MR. GOLDBERG: If I could have a representative who
12 works with me appear, that would be okay.

13 THE COURT: Absolutely.

14 MR. GOLDBERG: Okay. I appreciate it. Thank you.

15 THE COURT: Absolutely. Anyone else?

16 MS. CALTON: For clarification, your Honor, will the
17 status conference in the adversary proceeding be resumed this
18 afternoon or set for some other day?

19 THE COURT: What more did you think we needed to
20 accomplish?

21 MS. CALTON: Well, I don't know that we need to
22 accomplish, but if there's going to discuss discovery and
23 scheduling and briefing or is it really just going to be the
24 stay argument?

25 THE COURT: Well, you raise a good point. It is

1 possible that if the Court holds that the stay does not apply
2 and the city wants to go ahead with the adversary and
3 including the TRO, there may be some scheduling issues
4 discussed at that time.

5 MS. CALTON: Okay.

6 THE COURT: Okay? Okay. Mr. Shumaker.

7 MR. SHUMAKER: Yes, your Honor.

8 THE COURT: What's your answer to Mr. Hackney's
9 question?

10 MR. SHUMAKER: His question is -- there were
11 several, your Honor. I'm sorry.

12 THE COURT: Well, his question about the data room
13 being discoverable and, therefore, not subject to your NDA.

14 MR. SHUMAKER: Right. The reason that the NDA's
15 were necessary, your Honor, is because there's a number of
16 sensitive financial documents, projections that are in the
17 data room that the city strongly believes should not be
18 disseminated unless there's an NDA in place. We have
19 provided the parties with all of the documents that we've --

20 THE COURT: I have to ask you to pause there with
21 this very general question, which is in bankruptcy why isn't
22 every piece of paper not privileged discoverable by any
23 creditor?

24 MR. SHUMAKER: Well, your Honor, I think the answer
25 is if it's -- it might be discoverable, but it would -- it's

1 possible it would be provided to the Court under seal if
2 there was competitively sensitive information in there
3 that --

4 THE COURT: Competitively sensitive?

5 MR. SHUMAKER: Well, I mean sensitive financial
6 information.

7 THE COURT: These days.

8 MR. SHUMAKER: I'm sorry, your Honor.

9 THE COURT: What do you mean? What do you mean?
10 Give me an example.

11 MR. SHUMAKER: Well, there are --

12 THE COURT: Give me an example of a document that
13 parties can see but you don't want disseminated, whatever
14 that means.

15 MR. SHUMAKER: Your Honor, there are cash
16 projections relating to the city's financial future. There
17 are expert reports.

18 THE COURT: Okay. Stop there. Financial
19 projections. Why are they sensitive?

20 MR. SHUMAKER: They have --

21 THE COURT: Doesn't the city want every one of its
22 citizens to see what the city's financial future is projected
23 to look like?

24 MR. SHUMAKER: Yes, your Honor, but --

25 THE COURT: What's the problem?

1 MR. SHUMAKER: There are a lot of different
2 scenarios that are played out in those projections which,
3 again, the city has believed is it would not be in its best
4 interest to be disseminated in public.

5 THE COURT: Okay, but why not?

6 MR. SHUMAKER: Because we believe that the --

7 THE COURT: What would be the harm to the city's
8 interest if that happened?

9 MR. SHUMAKER: Yes, your Honor.

10 THE COURT: What would the harm be?

11 MR. SHUMAKER: Your Honor, you know, it's hard to
12 imagine the different scenarios that might develop with some
13 of the information that would suggest certain things. That's
14 why we proceeded in this fashion.

15 THE COURT: Well, generally speaking, speculation
16 and conjecture are not the basis for confidentiality, are
17 they?

18 MR. SHUMAKER: That's true, your Honor.

19 THE COURT: Now, you moved on to expert reports.
20 Those are discoverable, in any event, aren't they?

21 MR. SHUMAKER: Your Honor, I mean I guess there's
22 also a relevancy concern. I mean a lot of this
23 information --

24 THE COURT: This is bankruptcy. What's not
25 relevant? All right. I'm going to -- I'm going to just

1 pause this inquiry now because I sense the need for it.
2 We're going to reconvene this question also at three o'clock
3 because I want you to seriously consider with your colleagues
4 and your client the extent to which confidentiality is
5 necessary and appropriate for what's in your data room, and
6 at that point you can give me a more specific answer.

7 MR. SHUMAKER: Thank you, your Honor.

8 THE COURT: And that'll work for you, too, Mr.
9 Hackney.

10 MR. HACKNEY: It will.

11 THE COURT: All right. All right. So what else?
12 Okay. So I guess I need to make a decision about the length
13 of depositions. I am persuaded that the depositions of the
14 three city witnesses should be permitted for six hours, and
15 the Court will allow that. It is the Court's hope and
16 expectation that these depositions can be scheduled as
17 promptly as possible so that parties opposing the motion can
18 determine the extent to which they will put on rebuttal
19 testimony. In the circumstances, the Court will order the
20 disclosure of rebuttal witnesses 24 hours after the
21 conclusion of the last of the three depositions, and then the
22 city will have an opportunity to depose them if it sees fit.
23 Having said that, it is still the Court's strong intent to
24 proceed with the hearing on the date it set. Anything else
25 we can do between now and three o'clock? Sir.

1 MR. NICHOLSON: Michael Nicholson appearing for
2 International Union, UAW. I won't be able to be here at
3 three o'clock, your Honor, because of a prior commitment, but
4 I did want to report to the Court that with respect to the
5 NDA, the nondisclosure agreement, in meetings leading up to
6 the filing, we raised the very same questions the Court
7 raised and really didn't get a satisfactory answer. We said
8 why shouldn't retirees, our members, citizens, be allowed to
9 know what's going on, and we were told we wouldn't get
10 certain information unless we signed the NDA. We refused to
11 do that. We still have not signed the NDA. I think the
12 Court's concern is very appropriate. Thank you.

13 THE COURT: All right. I do have one more thing to
14 put on the agenda for three o'clock, which is the issue that
15 I raised about how much time each side should be allowed to
16 present evidence at the hearing. I'd like for you to suggest
17 some answer to that question to me at that time. Anything
18 else anyone have at this time? All right. We'll be in
19 recess until three o'clock.

20 THE CLERK: All rise. Court is in recess.

21 (Recess at 11:16 a.m., until 3:01 p.m.)

22 THE CLERK: All rise. Court is in session. Please
23 be seated. Recalling Case Number 13-53846, City of Detroit,
24 Michigan, and Case Number 13-04942, City of Detroit versus
25 Syncora Guarantee, Incorporated, et al.

1 THE COURT: Okay. Let's address the automatic stay
2 issue.

3 MR. SHUMAKER: Your Honor, could I interrupt with
4 two preliminary matters if it's okay?

5 THE COURT: Sure.

6 MR. SHUMAKER: My colleague, Ms. Ball, is going to
7 argue the stay motion, but two things I wanted to get back to
8 your Honor on. One of them was, in light of your Honor's
9 willingness to have this hearing so quickly this afternoon, I
10 wanted to indicate that the city is willing to dissolve the
11 TRO, so prior to the automatic stay motion being heard we
12 thought we should tell you that.

13 The second thing is with regard to the data room. I
14 wanted to be very clear that the city very much agrees with
15 your Honor that this is -- we should be as transparent as we
16 possibly can be with regard to documents affecting the city
17 and its citizens, and what we would propose, though, as much
18 as we agree with that, there are some documents -- we talked
19 about the 70,000 or so pages that are in that data room over
20 the break, and there are certain documents that we have
21 concerns about. There's really kind of two categories. One
22 is documents that involve individual privacy issues. There
23 are some documents relating to different employee salaries,
24 compensation, benefits, Social Security numbers and whatnot
25 that we would be very reluctant to have disseminated publicly

1 for obvious reasons.

2 And then, secondly, in connection with sort of some
3 of the pension assessments, the city agreed to an agreement
4 with Milliman, which is a pension actuary, and as part of the
5 city's agreement we agreed to an NDA with Milliman, so anyone
6 who has come into the data room since then can get access to
7 the Milliman documents but also has been required to sign an
8 NDA. We're happy to talk to Milliman about that, but that
9 was the other category that we were concerned about that
10 was -- obviously had some sensitivity as well. What we would
11 propose is that if -- if it was all right with your Honor,
12 that we go through, cull out any of those documents that we
13 have those concerns about, and approach your Honor with a
14 motion for a protective order very, very quickly. We don't
15 think any of this stuff has any relevance to the ongoing
16 assumption motion, but if we determine that the protective
17 order motion has to be filed, to get it filed in the next day
18 or two and then come back perhaps next Wednesday, if your
19 Honor was amenable to that, to argue that if there were
20 certain documents that we thought really should remain under
21 seal and require further protection.

22 MR. HACKNEY: That makes sense to me, your Honor. I
23 think it switches the burden a bit. Instead of saying it's
24 all confidential until it's not, it says it's all not
25 confidential unless it should be.

1 THE COURT: All right. So this will solve the issue
2 you raised initially about discoverable material. Yes?

3 MS. CALTON: Judy Calton for Detroit Entertainment
4 and Greektown Casino. We've been told that my clients aren't
5 eligible for the data room; that they won't tell the criteria
6 for who is eligible for the data room, which this may be
7 great for these two parties, but it doesn't help for the rest
8 of us. I don't know what the criteria is for who can have
9 access.

10 MR. NEAL: If I could -- good afternoon, your Honor.
11 Guy Neal, Sidley Austin, for National Public Finance
12 Guarantee Corp. I rise to address the Milliman issue. The
13 city has taken the position that in order for parties in
14 interest and creditors to have access to these actuarial
15 reports and valuations of their post-employment benefits,
16 OPEB's, that you need to release Milliman. You have to
17 execute a third-party release. We have not executed that
18 release. We don't believe it's appropriate that we need to
19 enter into a release in order to obtain these materials. If
20 Mr. Shumaker's opinion --

21 THE COURT: Of what?

22 MR. NEAL: Excuse me. Release of any and all claims
23 that one may have against Milliman. I'm not saying we have
24 claims, but I'm not sure why one needs to release a party in
25 order to get access to information that may become public.

1 If it's the city's position that they're going to arrive at
2 a -- they're going to evaluate what needs to be public and
3 what needs not to be public by the next hearing, we're happy
4 to work with the city on that. If they have a stated
5 position that they're going to hold firm to this third-party
6 release and the parties need to sign it, I'd like to have
7 that addressed today.

8 MR. GORDON: Good afternoon, your Honor. Robert
9 Gordon on behalf of the Detroit Retirement Systems. I would
10 echo the comments of Mr. Neal on that point. There already
11 have been also, just for the Court's edification, releases or
12 information provided by the city about some of those
13 Milliman, quote, unquote, reports, and I use that term
14 loosely because I don't believe they are reports. They are
15 letters, they are analyses, but they're not actuarial
16 reports. But, for example, there was a June 4 letter from
17 Milliman that was in that data room that was subject to these
18 confidentiality agreements, but then there's been information
19 released by the city about those reports, so there's
20 additional issues about whether things that are in that data
21 room and that might have been arguably at one time subject to
22 confidentiality are still subject to it, so I welcome having
23 that discussion at next week's hearing. I don't think anyone
24 will be prejudiced in the interim. Thank you.

25 MR. SHUMAKER: And, your Honor, that is what I was

1 talking about is that the city was required to enter into
2 this contract with Milliman, and that's who we would like to
3 talk to about addressing the concerns that were just raised
4 about those documents. As to the initial --

5 THE COURT: Well, before we move on from that,
6 please ask the people with this firm that if they're not
7 willing to excuse what is apparently your contractual
8 requirement to get a release from the people who see their
9 work product, they need to come to court next week and talk
10 with me about it.

11 MR. SHUMAKER: Be happy to do that, your Honor. And
12 then as to access to the -- to I think it was Detroit
13 Entertainment, again, considering that this is the approach
14 that we think should be taken, they would get access like any
15 other objector or party.

16 THE COURT: All right. So we'll look forward to
17 your motion in the next day or so. Ms. Ball.

18 MS. BALL: Thank you, your Honor. Good afternoon.
19 Corinne Ball on behalf of the City of Detroit. Your Honor, I
20 rise to do a number of things, but I thought it might be
21 helpful, with the Court's indulgence, if I provided the
22 context in terms of the nature of the asset that we're
23 talking about this afternoon. The casino tax revenues are
24 probably the highest quality revenue stream the city has. It
25 certainly is one of the largest and we believe the most

1 stable tax stream that the city has generating in excess of
2 175 million a year and forecast to generate roughly that much
3 in at least each of the next ten years. Being able to use
4 this valuable revenue stream is pivotal to the overall
5 resolution of this case and the rehabilitation of the city.

6 Another point that's been bouncing -- perhaps we
7 could assist the Court -- are the numbers that have been
8 discussed in connection with the swap, and your Honor may
9 wonder why. With these particular swaps, which are between
10 the counterparties and the service corporations, the
11 termination value, your Honor, floats inversely with interest
12 rates, so as interest rates rise, the termination value is
13 reduced so that as of now I am told the discounted price to
14 free up this revenue stream is less than 200 million and, in
15 fact, estimated at 190 million. To date I think there has
16 been no debate in any of the three litigations involving the
17 casino revenues that if the swap obligation is discharged,
18 the lien on these revenues is released. I also think there
19 is no debate that Syncora has not paid anything on the swaps
20 and that there are no amounts due.

21 Moreover, your Honor, absent the forbearance
22 agreement, were the swap counterparties to exercise their
23 alleged rights under Section 560 to terminate the swap, by
24 our calculation, as is reflected in Mr. Orr's affidavit,
25 Syncora's exposure is capped at \$27 million.

1 Your Honor, as is obvious to me but sometimes not as
2 obvious to others given the pendency still of litigation and
3 the fact that the city has no assurance that the settlement
4 with the counterparties will be approved, it may, in fact,
5 flounder or fail. As is obvious from the 13 objections filed
6 to date, there are key issues as to which the city is not
7 prepared to concede any of these points today, since it
8 doesn't know where the settlement will end up, but certain
9 issues, your Honor, we think may be raised this afternoon,
10 and I wanted to share with you our view that we'd like to
11 make certain assumptions during our argument this afternoon.

12 Key among those issues which are being settled,
13 should the settlement and assumption motion be approved and
14 succeed, is are the casino wagering tax revenues special
15 revenues within the meaning of 9022. There is dicta in the
16 Jefferson case cited by Syncora, and, your Honor, I know
17 there are three JeffCo decisions that have been cited
18 frequently with you. I'm referring to the decision on the
19 receivership, which is reported at 474 B.R. 28, suggesting
20 that a revenue picture like ours it may or may not be special
21 revenues, so we are reserving that issue.

22 Obviously, your Honor, we're also not prepared to
23 concede that the swap is valid or that the pledge of the
24 revenues are valid, but having from the outset reserved on
25 those issues, we think we can still address the stay's

1 applicability to the wagering tax revenues.

2 I was impressed by Syncora's statement of yesterday
3 where for the first time they asserted that the casino tax
4 revenues, the wagering tax revenues payable by casino owners
5 to the city, are not property of the city, and for that
6 proposition -- and your Honor will have to excuse me because
7 we'll be referring to New York cases a lot this afternoon as
8 many of these documents are governed by New York law -- they
9 point to cases which there's only one common theme among the
10 escrow cases cited by Syncora in support of that proposition,
11 and the common theme is you have to go to the underlying
12 agreement, and you have to look at it and see what it says.
13 So if we go to the key agreement, which is the collateral
14 agreement, which, as your Honor knows, Syncora is not a party
15 to, the agreement has a definition of pledged property in
16 Section 1.2, which keys into the definition of revenues that
17 are pledged and ultimately to the city's tax -- wagering tax
18 revenues. So I think that the agreement is fairly clear that
19 these revenues are property of the city, and the remedy
20 section -- and, in particular, Section 11(c) of that
21 collateral agreement -- confirms that the revenues remain
22 property of the city in these accounts and cannot be accessed
23 except with an appropriation by the city of its revenues to
24 that purpose. So I think this agreement, were one to read
25 it, is fairly clear that these revenues are remaining

1 property of the city. But I think we would then turn, your
2 Honor, beyond the agreement to the decision again by Judge
3 Bennett in ruling on the receivership motion. You may recall
4 that the monolines and other warrant holders in that case
5 sought to restore the receivership in the context of
6 Jefferson County's Chapter 9. Judge Bennett spent a very
7 thoughtful opinion, and in that he concluded that the pledged
8 revenues, even though in possession of a receiver appointed
9 by a state court, remained property of the Chapter 9 debtor
10 and, as your Honor knows, ultimately did not restore the
11 receivership and did say that these properties are protected
12 by the stays of 362(a) and 922. So I think we have the
13 general proposition look to the agreement as well as a very
14 specific one in Chapter 9, and that was an exceptionally
15 well-reasoned opinion.

16 I also think, your Honor, that there should be no
17 doubt that the casino tax revenues, technically wagering tax
18 revenues, are taxes within the meaning of Section 922(a)(2),
19 which has a very specific reference to taxes being protected.
20 While we're not prepared to concede, as I indicated already,
21 your Honor, that casino revenues are special revenues,
22 assuming arguendo for this afternoon that they are special
23 revenues within the meaning of Section 9022, there's still
24 two problems. It's not clear to us that Syncora has
25 standing -- since it's not a secured party and it cannot

1 apply these revenues, that it has standing to raise or to be
2 within the protection of 922 at all. It's not a party.
3 These properties were not pledged to them. But more
4 importantly, if one actually looks to the words of 922,
5 literally it says that the stay does not apply to the
6 application of special revenues to the payment of
7 indebtedness. As I think I've already shared with your
8 Honor, there are no amounts owing under the swap, and there
9 is no indebtedness remaining to be paid currently due on the
10 swaps, so we think reliance on 922(d) is misplaced for two
11 reasons.

12 And, your Honor, if I -- I thought it might be most
13 helpful if I went to 922(a)(2) first -- it's a very narrow
14 argument -- and then if your Honor would still like us to
15 argue the applicability of 362(b)(17), we're prepared to do
16 that. I don't think there's any debate that wagering taxes
17 are taxes.

18 I also think, your Honor, that the 11th Circuit in a
19 case called In re. Patterson -- and perhaps at this point,
20 your Honor -- I have assembled a listing of the authorities
21 that I'd be using. Would it be helpful to the Court so that
22 I don't have to keep reporting them -- I also have some for
23 Syncora. May I approach, your Honor?

24 THE COURT: Yes.

25 MS. BALL: Your Honor, the 11th Circuit case named

1 In re. Patterson, the 11th Circuit has told us that a credit
2 union's action to freeze revenues constitutes a violation of
3 the stay as an act to enforce a lien. That particular
4 passage appears at 967 Fed. 2d at 512. We also have one of
5 your colleagues from the Southern District of Ohio in a case
6 called In re. Figgers. In that case, the Court was
7 confronted with a refusal to release funds, which the Court
8 similarly found a violation of the stay as a prohibited
9 enforcement and collection action. So, your Honor, I think
10 we now have freezing or refusing to release is enforcing a
11 lien, and we have taxes, so plain meaning for this
12 afternoon's purposes, the casino wagering tax revenues --
13 there should be a stay protecting them from enforcement of a
14 lien.

15 Now, what else do we know about a stay under Chapter
16 9? Again, thanks to Judge Klein in Stockton --

17 THE COURT: Well, the question that Syncora raises
18 is how is U.S. Bank's act in allowing the funds in the sub
19 account to accumulate rather than to turn it over to the city
20 a violation of the stay, an exercise of control --

21 MS. BALL: Your Honor, I think --

22 THE COURT: -- assuming it is property of the
23 debtor?

24 MS. BALL: I think, your Honor, that's the Southern
25 District of Ohio. That's enforcement of lien, refusing to

1 release revenues. Similarly, your Honor, I think that
2 Syncora has somewhat overstated the Supreme Court's ruling in
3 Strumpf. Your Honor may recall that the Supreme Court did
4 find in Strumpf that freezing revenues for a short duration
5 was not a violation of the stay, but it was really a stopgap
6 measure, if one looks at that case at 516 U.S. 19 and 20, to
7 get to the Bankruptcy Court to seek relief from the stay.

8 Your Honor, U.S. Bank has been releasing revenues
9 without a hitch until June 17th when communication started
10 from Syncora. There were -- all of the events that were
11 alleged in Syncora's papers had all -- many had occurred
12 before then, but a custodian has a view. I wouldn't be
13 surprised at all. The documents only protect them if they
14 rely on the directions of the swap counterparties as the
15 secured party. As part of the forbearance agreement, your
16 Honor may recall those swap counterparties consented to the
17 continuing release of those funds to the city. Query, would
18 U.S. Bank ever had changed releasing revenues which it had
19 been doing since the emergency financial manager was
20 appointed in March, it had been doing for over a year when
21 there was an intervening credit rating downgrade? It was
22 doing what the secured parties wanted it to do until a
23 communication from Syncora, and the nature of those
24 communications, your Honor, are probably beyond this
25 afternoon, but they were peppered with words like "demand

1 that you hold." It was not "look to your agreement." And
2 if, in fact, 922(a)(2) applies, if this matter of law does,
3 and we would submit to your Honor on these facts it does,
4 then there are no exception -- the 362(b) exceptions that are
5 being argued by Syncora, they don't apply in Chapter 9.
6 There has to be another basis to come to your Honor and seek
7 relief from the stay. 362(c), (d), and (e) apply, but (b)
8 doesn't. So if we're in Chapter 9 stay world, I think U.S.
9 Bank has to think about it. I think Judge Klein and Judge
10 Bennett, both in Stockton and all three JeffCo cases, have
11 underscored that the exceptions to the automatic stay that
12 one would classically rely on, police power, 362(b), do not
13 apply, so in construing that agreement, I think -- which no
14 one has done and the custodian has zero obligation to do, a
15 fact -- that's the position it has espoused in filings in the
16 adversary proceeding now pending before your Honor, so we
17 know, your Honor, that if a Chapter 9 stay applies,
18 362(b)(17) doesn't.

19 Now, if I were to take a detour with your Honor's
20 indulgence -- bear with me because there is a critical
21 difference between 362(b) and Section 560. The way the
22 exceptions work in the safe harbor world it appears to us --
23 it appears to me first from Judge Shannon's decision in
24 SemCrude where he actually took the lead -- he took the
25 general proposition that the automatic stay is very broad

1 relying on Timbers and Midatlantic and said that exceptions
2 really have to be construed extremely narrowly. I think we
3 know that from him, but he looked at the safe harbors, and I
4 want to get back to 560. It is relevant to the Chapter 9
5 stay. He looked at the safe harbors as saying it kind of
6 works as a package, but fundamentally it's about offset
7 netting and the termination of qualifying financial
8 contracts. In Judge Shannon's SemCrude case, your Honor may
9 not be aware of the facts, but it involved what the Wall
10 Street types call a triangular setoff, which means that if
11 one of the nondebtor parties' affiliates owes an obligation,
12 they can set off -- I mean one of the debtor's affiliates
13 owes the counterparty an obligation, they can set off the
14 debtor's property. The contract said that was totally
15 permissible. They look to 362(b)(17), contract right, we're
16 exercising this. Judge Shannon, who was affirmed in his
17 decision, said, no, very narrow exception. You still have to
18 fundamentally be entitled to set off or exercise the rights
19 that you're seeking to exercise.

20 So why do I want to get back to 560? 560, 561, 559
21 are the part of the safe harbors. If your Honor looks to the
22 language of 560, unlike the language of anything in 362,
23 including 362(o), 560, were the swap counterparties to
24 actually be terminating the swap, says right in it -- and I
25 quote, your Honor -- that they have a right to do so

1 notwithstanding any provision in this title, meaning
2 including, I would argue, 922(a)(2) if it were the swap
3 counterparties who were, in fact, terminating the swap. They
4 have something they can point to. 362(b) has no such
5 reference to notwithstanding anything else in this title.
6 362, including 362(o), operate subject to Chapter 9. So I
7 think that when we think of the decisions, your Honor, that
8 have really looked at this issue and they are, when one
9 thinks about the qualifying financial contract decisions,
10 outside of Chapter 9, you have to start, as I said, with
11 Judge Shannon's decision in SemCrude on the triangular
12 merger.

13 Shortly after that, Judge Peck would follow again.
14 He, too, encountered very creative arguments that banks and
15 financial parties raised to say that they were arguing --
16 they were asserting a contractual right that enabled them to
17 squirt through this very narrow exception of 362(b)(17). So
18 even if we were only operating under the automatic stay, I
19 think we have to look to Judge Peck's ruling against
20 Swedbank, and, your Honor, that's reported on the list that I
21 have given you at 433 B.R. 101, and that was affirmed. And
22 Judge Buchwald in affirming that decision went at length
23 through the legislative history of the safe harbors, and, in
24 fact, relied on Dewsnup, the Supreme Court decision, to say
25 we have to pay attention to the fundamental principles. If

1 this was designed for a setoff and a termination, that's the
2 only time it can be used. So Swedbank that got the bright
3 idea that it could have had a contractual right to do more
4 than that was found to have violated the stay and directed to
5 release to Lehman the monies it was holding.

6 Shortly after that a name familiar to this Court,
7 Bank of America, would try something very similar against
8 Lehman. They said, "Gee, we also have a contract right to
9 take your monies wherever we're holding it and apply it to
10 your debt. And since we're involved in a swap, we should be
11 able to do that." And, your Honor, that case was cited in
12 our statement to you of earlier this week. And Judge Peck
13 said, "Wait a minute. No. You are not within the safe
14 harbor, and you shouldn't have done that. You should have
15 come to me first and demonstrated your entitlement to relief
16 from the stay." Failing that, he found that they had, in
17 fact, violated the stay.

18 You would then have the opportunity -- and Lehman
19 gave Judge Peck many opportunities to deal with the safe
20 harbors, your Honor. Forgive me for reverting to New York
21 decisions so often, but he would then have to deal with
22 another triangular setoff case with UBS. In the list of
23 authorities I've given you, your Honor, that's the Lehman
24 case that is followed with the initials UBS. Again,
25 following Judge Shannon's lead, no, your contract may say --

1 or you can argue till you're blue in the face your contract
2 says you can do that, but that is not permitted. That is not
3 a right that should be recognized. It's beyond the
4 termination of a swap and going against collateral.

5 The case that probably gets the most press -- and it
6 was not reported, your Honor, so I don't know your rules
7 regarding an unreported decision. It was a decision in the
8 transcript of Judge Peck. In that case, a financial party
9 known as Metavante had relied on a provision in the ISDA
10 master swap. It's very interesting. Metavante was, in swap
11 vernacular, out of the money, which meant that Metavante
12 should have been paying monies periodically into the debtor.
13 Metavante said, "Wait a minute. Safe harbor. I have the
14 right -- I have the right to terminate the swap, and I
15 haven't decided whether I want to or not, but I also have a
16 contract provision which I'm exercising under 362(b)(17) that
17 says I don't have to perform if the debtor is not
18 performing." Judge Peck had little patience -- had little
19 patience with that provision and said, "You waived your right
20 to terminate on account of the bankruptcy. You haven't done
21 it, and you can't exercise other remedies." That's not the
22 scope of this exception known as 362(b)(17). It's far
23 narrower.

24 Another bank would come along shortly thereafter,
25 the Bank of New York. And your Honor may be familiar -- and

1 I know that it did come up, I think, in Collins & Aikman
2 where there are special provision entities where there are
3 management rights, and if one were to become bankrupt, the
4 management rights would flip to the nondebtor. Someone
5 sought to enforce such provision against Lehman. They had a
6 swap and a financial contract, and they also had this flip
7 right. And they literally read 362(b)(17), any contract
8 right. Judge Peck said absolutely not.

9 It's not confined to Wall Street cases, your Honor.
10 In Calpine there was a forward contract in the energy field
11 between Calpine and Reliant Energy, and Judge Lifland was
12 confronted with Reliant Energy as a nondebtor trying to
13 exercise a right, a remedy, under its contract under 362(b).
14 Judge said, "Wait a minute. You're not terminating this
15 forward. That's all that's protected in the safe harbor.
16 It's not a roving commission to do what you want to a debtor
17 and withhold."

18 Your Honor, Judge Gonzales had a similar experience
19 in Enron when someone commenced a DEC action in state court
20 in reliance on a remedy in their contract, and he found that
21 that, too, was a violation of the stay.

22 But what I'm kind of concerned about -- and I
23 certainly did not mean to concede -- we're not sure since
24 we've heard conflicting statements and we certainly are not
25 conceding that Syncora has any contract rights with respect

1 to the casino revenues and the collateral agreement. In
2 fact, we've heard them say they're not doing anything. To
3 your Honor's point earlier, they're passive. So, your Honor,
4 we think they can't be on all sides of this issue. We think
5 that the automatic stay of 362(a) has to rise to protect
6 property of the city of this magnitude. Your Honor, this
7 property has substantial value. It can support substantial
8 leverage to resolve this case. It should be protected by the
9 automatic stay as a critical resource of the city, but its
10 characteristic as a tax can't be ignored either, which would
11 bring in the separate protection of Section 922(a)(2). And,
12 your Honor, there's only one exception for that, and that's
13 in the safe harbors themselves, not the exceptions from the
14 stay, and I don't think that anyone, in light of the
15 forbearance agreement, certainly the swap counterparties, are
16 not terminating the swap.

17 Your Honor, I'd like to reserve the right to respond
18 as this was somewhat unscheduled, and we've tried to
19 anticipate the arguments that Syncora might raise.

20 THE COURT: Thank you.

21 MR. HACKNEY: Good afternoon, your Honor. Stephen
22 Hackney on behalf of Syncora. So there were a lot of cases
23 that were referenced there. I would propose to start with
24 each of the three arguments I think that were made as to why
25 the stay should not apply, and I'd propose to start with the

1 fact that we contend that the property of the casino revenues
2 is not property of the estate. And I thought it would be
3 helpful if I could walk the Court through where exactly this
4 property goes and how it gets to where it goes under the
5 collateral agreement, so there -- I don't think -- I heard
6 Ms. Ball say that I guess maybe they're reserving on the
7 question of whether it's a special revenue, but these are
8 excise taxes that we believe constitute special revenues that
9 are imposed on the activity of gaming and gaming related
10 activities. They come into the hands of the casino, and then
11 instead of being paid to the city, as they normally would be,
12 the city gave irrevocable instructions to the casinos
13 directing them to pay the money to U.S. Bank. And the
14 irrevocable instructions are interesting because they also
15 come with a release that says if you pay the money to U.S.
16 Bank, you have no further obligation. You are released.
17 U.S. Bank then under the collateral agreement sets up a
18 number of accounts. There's an account called the holdback
19 account, there's an account called the developer account, and
20 there's an account called the general receipt subaccount.
21 Put the holdback account over to this side for a moment
22 conceptually. The developer account and the general receipt
23 subaccount are accounts that U.S. Bank itself sets up under
24 the collateral agreement. They are housed at -- in New York
25 City, so the accounts themselves are physically outside the

1 State of Michigan. The funds then go into the developer
2 account, and U.S. Bank at certain times then itself transfers
3 the funds from the developer account to the general receipt
4 subaccount. They are only paid -- and the collateral account
5 uses the word "the custodian shall make payment of the funds
6 to the city upon the" -- either the city fulfilling certain
7 specific events or the nonoccurrence of other events as we
8 contend under Section 5.4, a termination event, an event of
9 default. If those things are happening, then the custodian
10 shall not pay to the city the funds in the general receipt
11 subaccount.

12 The reason I'm going through this in such detail is
13 because the question is whether or not the casino revenues
14 are property of the estate. I don't think it's a question as
15 to whether the debtor has an interest in them. It certainly
16 has an interest in them, but that is not tantamount to saying
17 that it is property of the estate. Here the --

18 THE COURT: What's the nature of that interest that
19 you concede?

20 MR. HACKNEY: I would -- what we have analogized it
21 to, your Honor, is a residual interest like one in an escrow
22 account. And, in fact, I think we have made an argument in
23 our papers that the collateral agreement does create an
24 escrow account under New York law. It has the hallmarks of
25 an escrow --

1 THE COURT: Would you agree it's a contingent
2 interest?

3 MR. HACKNEY: Yeah. I think -- I would think of it
4 as residual, but I think contingent maybe is also accurate in
5 the sense that it is contingent upon a number of things
6 either coming to pass or not coming to pass before the city
7 has a right to receive the property, but we have cited the
8 cases to you that we cited --

9 THE COURT: Well, let me ask you to pause one more
10 time --

11 MR. HACKNEY: Oh, you bet.

12 THE COURT: -- for what, you know, will seem like a
13 silly question, but I'm going to put it to you anyway. If
14 it's not the debtor's property, whose is it?

15 MR. HACKNEY: I think that the answer to that is
16 that it is property of the custodian. The custodian has
17 title to the property. It has control and possession over
18 the property. There are other people that have interests in
19 the property. The service corporations have an interest in
20 the property by operation of the city pledged to them.

21 THE COURT: The custodian has no beneficial interest
22 in the property.

23 MR. HACKNEY: I would have to think about that some
24 more. The custodian is entitled to --

25 THE COURT: There are no circumstances under which

1 the money would ever go to the custodian for the custodian's
2 own use and benefit; right?

3 MR. HACKNEY: I will have to duck that one, your
4 Honor, and say I'm not sure just because there are
5 circumstances where in its role as contract administrator the
6 contract administrator is allowed to pay itself some of its
7 fees. I don't know if the custodian has similar provisions
8 that say, "Oh, by the way, before I kick the money out, I get
9 to hold back the X, Y, and Z." I'm not saying it does. I'm
10 just saying I'm not certain. I can't concede it from the
11 podium, but -- so does the service corporation have an
12 interest in this property that is the property of the
13 custodian? Yes. Does the swap counterparty --

14 THE COURT: All right. Let's stop there.

15 MR. HACKNEY: Yeah.

16 THE COURT: Assuming for the moment that the city
17 has even a contingent interest in the money on deposit in
18 this account, isn't any attempt to exercise control over that
19 contingent interest stayed by Section 362(a)(3)?

20 MR. HACKNEY: Yeah. I guess I would say we don't
21 believe so, your Honor, because of the cases that we have
22 cited that say where in the context of an escrow all the
23 debtor has is a contingent interest that isn't sufficient to
24 establish that the property is property of the estate, and so
25 the stay does not apply in the first instance. And I would

1 note that we have also cited cases to this effect.

2 THE COURT: But what's the logic behind that? I ask
3 that because in every other circumstance I can think of where
4 a debtor has a contingent interest in property, that
5 contingent interest is considered to be property of the
6 estate protected by the automatic stay. Why would an escrow
7 agreement be any different?

8 MR. HACKNEY: Well, I can only say that I guess
9 reason number one would be certainly we've cited cases
10 suggesting that it is, but in terms of the policies behind
11 those cases --

12 THE COURT: Okay.

13 MR. HACKNEY: -- I think the policies are that there
14 is value to having certainty with respect to security that's
15 been granted by a debtor that is no longer under its
16 possession or control, and so you can see a situation where
17 if the debtor -- I can see where the debtor has -- is driving
18 its car around, but, yes, it's pledged the title to a bank
19 there. The debtor still retains the primary possession and
20 ownership of the property. The creditor there's interest is
21 a security interest that they're not allowed to foreclose
22 upon without violating the automatic stay. I understand that
23 as an example where there are contingencies to the debtor's
24 interest, but it's got the hallmarks of possession and
25 control, and it's actually using the car. Where I think

1 things change from the standpoint of the Bankruptcy Code,
2 they certainly change from the standpoint of the cases that
3 we've cited is where the debtor now gives the car as well to
4 the bank that's also holding the title and saying, "Now this
5 is property that can be held pursuant to this agreement. I
6 can only get it back in these certain circumstances."

7 THE COURT: So if under state law a creditor has a
8 possessory security interest in property, your position would
9 be that that creditor is not required to seek relief from the
10 stay because the stay doesn't apply? That's an extraordinary
11 position to take.

12 MR. HACKNEY: Where the creditor has a possessory
13 interest in --

14 THE COURT: Possessory, yeah. It holds possession
15 of the property as a secured creditor under state law like a
16 pawn shop or a bank that holds a CD, for example, as a
17 security interest.

18 MR. HACKNEY: What I would say is that the escrow
19 cases we have cited I think read onto that circumstance that
20 you've identified, which is that, yes, where the maintenance
21 of the escrow, the continued operation of the escrow
22 subsequent to the bankruptcy filing does not constitute a
23 violation of the automatic stay.

24 THE COURT: Well, but that would only be because the
25 stay doesn't apply; right?

1 MR. HACKNEY: That is correct. I mean I'm not
2 trying to assume the conclusion, but I'm saying the cases
3 that we have cited were considering the question of whether
4 or not the maintenance of the escrow violated the automatic
5 stay because of the fact that the debtor had -- did have
6 potentially a residual interest in the property that was in
7 the escrow account, and what those cases said is the debtor's
8 residual interest does not rise to the level of making the
9 property property of the estate. Part of the reason we're
10 analogizing to them is we do think at some point the rubber
11 has to meet the road in terms of looking at --

12 THE COURT: Well, but there are a gazillion cases
13 that say a secured creditor who's in possession of collateral
14 must turn that over to the debtor and -- to the debtor, and
15 the creditors' relief is to ask for adequate protection,
16 right --

17 MR. HACKNEY: Your Honor, I have to --

18 THE COURT: -- outside of Chapter 9?

19 MR. HACKNEY: I have to say I -- I will say, your
20 Honor, I'm not familiar with those cases as I stand here
21 today. I prepared on the cases that were cited in the city's
22 papers. It does seem to me, though, that to the extent those
23 cases hold that way, that the creditor has to pay the money
24 over to the debtor, they may be distinguishable from the
25 escrow context wherein the escrow is specifically designed to

1 capture the money while different parties' potential rights
2 are assessed, so I can only say that the cases we have cited
3 are ones in which there's -- it's agreed that the debtor has
4 a contingent and residual interest to the property
5 potentially someday, but it doesn't have either possession or
6 control of the property. We have cited cases saying that the
7 operation of the escrow is not outside the automatic stay.

8 Your Honor, I would like to speak briefly, if I
9 could, to the question of the pledged special revenues. So I
10 don't think that there's a real debate that -- as to whether
11 these are pledged special revenues. I understand counsel's,
12 I guess, reserved on that, but they are excise taxes.
13 There's an opinion from Orrick Herrington that was issued in
14 connection with the 2009 collateral agreements formation
15 identifying the wagering taxes as excise taxes, and Mr. Orr
16 himself in his proposal identified them as such, so I think
17 what I'd like to turn to, though, is the city's argument that
18 there's not going to be any application to indebtedness
19 because -- the fact that they're staying current on the swap.
20 And I want to address this because I think this misapprehends
21 the precise nature of the structure because the obligations
22 to make the periodic swap payments are the obligations of the
23 service corporation. The city's obligations that are secured
24 by the city's pledge of these revenues are obligations under
25 the service contracts. All of the city's obligations under

1 the service contracts have accelerated as a result of the
2 city's bankruptcy filing, so we disagree with the fact that
3 the city is current with respect to its obligations under the
4 service contract that the city pledged secures. So I think
5 that argument by the city misses the mark.

6 THE COURT: Is that acceleration legal?

7 MR. HACKNEY: To the best of my knowledge, it is,
8 your Honor. It's provided for in the service contracts that
9 the city signed that contain numerous opinions that were
10 rendered with them regarding the legality of those contracts.

11 THE COURT: Is there any other indebtedness you rely
12 on?

13 MR. HACKNEY: Well, I guess what I would say is that
14 the ultimate application of the wagering revenues to the
15 obligations of the service corporations under the swap in the
16 future would also be potential indebtedness that would
17 require the trapping now. For example, if Mr. Orr decides
18 I'm going to stop paying the swap in light of the fact that
19 the trap is valid, then the payments will be made out of the
20 trapped funds via the -- from the city -- from the custodian
21 to the --

22 THE COURT: Let's assume your argument is accurate
23 as far as it goes. That is to say, the party holding the
24 lien can proceed. How does that help you? Why does that
25 suggest that there's no stay against Syncora because Syncora

1 does not have a lien?

2 MR. HACKNEY: Well, first of all, the language of
3 Section 922(d) is not versed in the language of who possesses
4 the right in question, which distinguishes it from something
5 like 362(b)(17), which we'll get to in a moment, which talks
6 about swap participants, but let me answer your question
7 head-on, your Honor, and say that remember that this is an
8 integrated transaction, and so the collateral agreement not
9 only takes pains to integrate itself into the swaps
10 agreement, the services agreement, and the contract
11 administration agreement, the swaps agreement also makes
12 clear that the services contract, the collateral agreement,
13 and the contract administration agreement are all credit
14 support documents underneath the swap agreement.

15 Now, the significance of this, your Honor, is that
16 the way this structure works is that because Syncora
17 possesses the -- along with FGIC, but because the insurers
18 possess the ultimate economic exposure here to the structure,
19 the system -- the structure gives them the power to enforce
20 the various agreements and the right to direct the actions of
21 other people. So if you look at the swaps agreement, for
22 example, Syncora is an explicit third-party beneficiary with
23 the rights to enforce the obligations underneath the swap
24 agreement, which, as I've noted, is integrated with these
25 other agreements. Under the services contract, it's also an

1 explicit third-party beneficiary with the rights of
2 enforcement, and what is also unique is that under the
3 contract administration agreement, it has the rights to
4 direct the actions of the service corporation, the custodian,
5 and the swap counterparties. The reason for that, your
6 Honor, is in order to remain in control of a structure that
7 it's ultimately going to be paying people on, if you default
8 on your insurance, you lose these control and direction
9 rights, so you have to be staying current, which Syncora has
10 done, but the -- I'm trying to be responsive to your point,
11 which is to say they keep saying -- you know, it's like a
12 drum they're beating to say that -- what they're really
13 saying, your Honor, is Syncora is not a signatory to the
14 collateral agreement. And you know what? They're right.
15 Syncora is not a signatory to the collateral agreement, but
16 you should know that its consent was required to enter into
17 the collateral agreement. It is a noticed party under the
18 collateral agreement. There are provisions in the collateral
19 agreement that say that in order to exercise its rights under
20 the collateral agreement, it must not be in default of its
21 credit insurance that hearken back to the other provisions in
22 the services agreement and the swap and the contract
23 administration agreement that talk about not being in default
24 of your credit insurance, and so Syncora is absolutely a
25 party in interest and a third-party beneficiary with rights

1 of enforcement, and that would entail the right to direct the
2 conduct of the swap counterparties, so even if the Court
3 decided under 922(d) it is important to me, the Court, that
4 the party asserting 922(d)'s exemption of special revenues
5 being applied to indebtedness have some connection to that,
6 what I'm telling you, your Honor, is we absolutely do because
7 that's the way these agreements are designed to work in terms
8 of the control, the consent, and the direction rights.

9 Your Honor, I was going to speak briefly to the
10 question of Section 362(b)(17) of the Bankruptcy Code, if I
11 may.

12 THE COURT: Yes.

13 MR. HACKNEY: So the key argument here, there is not
14 a suggestion, I don't believe, that the swap is not a swap,
15 that the collateral agreement isn't a security agreement
16 within the meaning of a swap agreement, which, by the way,
17 extends to agreements beyond just the swap agreement. I
18 think the sole argument that the city is making here is that
19 Syncora is not a swap participant, and so I think I would not
20 belabor or repeat the arguments that I all just made about
21 the way Syncora is intimately connected to and has the powers
22 of different aspects of the agreements to both enforce them
23 directly and to direct other parties to do things including
24 the swap counterparties. So from my standpoint at a
25 functional level, if you look at the language as to whether

1 Syncora is a participant in the swap, it fits within the
2 plain language not only because it has potential economic
3 exposure to it, but also because it has rights of
4 enforcement, and it has rights to direct the swap
5 counterparties underneath the swap. To me that makes it a
6 swap participant under the plain language.

7 There is admittedly -- there is a dearth of
8 authority on this question. We've researched it to say can
9 we find a case one way or the other, and while I'll start as
10 an advocate by telling you that we found no case saying that
11 a swap insurer is not a swap participant, I'll also be candid
12 and tell you that we haven't found a case that says that a
13 swap insurer is a swap participant, so we're somewhat in a
14 case of first impression, but I wanted to offer you two
15 notes. The first is that that Lehman case that they did cite
16 in their briefs, which is a -- I would describe as a highly
17 distinguishable case -- there was a -- Lehman involved, I
18 believe, Bank of America as attempting to use its role as a
19 custodian in one context, to grab the money and use it to set
20 off against an unrelated agreement that it believed it had
21 with Lehman, and not only was it held not to have the setoff
22 rights, which were the premise for what it was doing, it was
23 also -- certainly shouldn't be using the amounts it was
24 holding as custodian in order to try and set off its other
25 obligations, so Lehman is inapposite. Obviously we take the

1 admonitions to be cautious with respect to the stay
2 seriously, and I'm not diminishing them, but here is what is
3 interesting about Lehman, I think, which is when Bank of
4 America invoked Section 362(b)(17) in Lehman, it was just a
5 custodian, you know. I mean, yeah, they're a signatory to a
6 swap, but are they really a participant in the swap? They're
7 not somebody that's going to benefit from the swap one way or
8 the other. And the Court in that case never said, "You're
9 not a swap participant." It said, "I will address your
10 argument on the merits as to whether Section 362(b)(17)
11 applies," and then concluded that it did not. And I think
12 that's significant because Syncora is absolutely a market
13 participant in connection with the swaps. Swap insurance is
14 a common aspect of the market, and so to ignore the practical
15 realities I think would ignore some of the purposes of the
16 safe harbor.

17 I would also note that we were able to find language
18 from Collier's, and this is 5 Collier on Bankruptcy 560.031,
19 and what it said was the special protections for swap
20 agreements provided by Section 560 and other provisions of
21 the Bankruptcy Code are available to all parties to swap
22 agreements with the debtor because the swap -- the term "swap
23 participant" is broadly defined in Section 101(53C) to mean a
24 entity that, at any time before the filing of the petition,
25 has an outstanding swap agreement with the debtor, thus the

1 swap protections are generally available to all parties who
2 could benefit therefrom. That's obviously --

3 THE COURT: Collier cite any cases in support of
4 that?

5 MR. HACKNEY: It does not in the provision I'm
6 reading, so take it for what it's worth, your Honor. I
7 understand it's not the same as a Supreme Court opinion, I
8 know, but in short I think that if you take a functional look
9 at the purposes of the Safe Harbor Act, it was designed to
10 provide certainty with respect to swap participants with
11 respect to things like collateral agreements.

12 THE COURT: How do you deal with Ms. Ball's argument
13 that under 922(b), Section 362(b) does not apply?

14 MR. HACKNEY: Yeah. So under 922 -- and I'm
15 sorry -- was that --

16 THE COURT: (B).

17 MR. HACKNEY: I want to make sure. There was an
18 argument made under 922(a)(2) that these are the collection
19 of taxes. Am I mis --

20 THE COURT: Well, 922(a)(2), yes.

21 MR. HACKNEY: And then --

22 THE COURT: It's a stay applicable to all entities
23 of the enforcement of a lien on or arising out of taxes or
24 assessments owed to the debtor. There's that stay.

25 MR. HACKNEY: Yeah.

1 THE COURT: But there's nothing that suggests that
2 (b) -- the exceptions in (b) -- 362(b) apply to that stay.

3 MR. HACKNEY: Okay. So at the first level, our
4 argument, your Honor, is that under Section 922(d) what
5 922(d) says, "Notwithstanding section 362 of this title and
6 subsection (a) of this section," so even if Ms. Ball were
7 correct -- and I will tell you why we don't concede that she
8 is -- they still have to run the rapids of 922(d) because it
9 specifically excepts 922(a).

10 The second thing I will tell you, your Honor, is
11 that I would say we have conducted research on this, and we
12 were, if I'm not mistaken, only able to find one case that
13 related to this provision, and it's in my iPhone, so I don't
14 have it for you because you have to turn your iPhone off in
15 the courtroom, so -- which is a good -- which is a good rule
16 because we're all too connected, but, anyway, I was reading
17 the case over lunchtime, and what my associate told me was he
18 was only able to find one case where this was invoked, and
19 the case there involved confusion or attempts to collect
20 taxes by an entity that was distinct from the debtor. I
21 don't believe that this is currently the enforcement of a
22 lien against -- arising out of the taxes or assessments owed
23 to the debtor. This is the natural operation of the
24 collateral agreement, the irrevocable instructions that were
25 entered into long ago, so there is no action that's being

1 taken by someone. That's what's frustrating to the city is
2 the inaction, the refusal to transmit the monies that the
3 city has set by this -- by the dead hand of the collateral
4 agreement and the irrevocable instructions to flow directly
5 to the custodian.

6 THE COURT: You keep tripping over that. There's
7 lots of case law that says that Section 362 doesn't
8 distinguish much between action and inaction, and I assume
9 that case law would apply to 922 because it's the same
10 language, if not the same policy. How do I deal with that
11 here?

12 MR. HACKNEY: Well, I guess the -- I think the --
13 you would deal with it first by saying that it only applies
14 to property of the debtor ab initio, so you do have to get to
15 that stage. And then second, even if the -- even if we are
16 on the subject of action versus inaction being irrelevant,
17 you also do have to find that 92 --

18 THE COURT: What the cases say is that there are
19 many circumstances in which the inaction of a creditor
20 constitutes the exercise of control over the debtor's
21 property.

22 MR. HACKNEY: But in those cases I'm going to
23 surmise there is a finding that it is property of the debtor,
24 and there's also --

25 THE COURT: Right.

1 MR. HACKNEY: So --

2 THE COURT: Right. It is.

3 MR. HACKNEY: I also don't want to assume the
4 conclusion the other way against me, which is we have a
5 threshold question that says it's not property of the debtor.

6 THE COURT: Okay. So there's two different issues.
7 The first is is what is at stake property of the debtor. The
8 second issue is is what the debtor is doing in relation to
9 that property an exercise of control over it.

10 MR. HACKNEY: That's right, and that the 9 --

11 THE COURT: What the cases say is that on the second
12 issue, the issue of exercise of control, inaction can be an
13 exercise of control.

14 MR. HACKNEY: And I think the -- so and not to
15 forget that 922(d) is also an exception to 922 --

16 THE COURT: Right.

17 MR. HACKNEY: -- (a)(2), but I think -- Mr. Bennett
18 has handed me a helpful note, and hopefully I'm doing him
19 justice, but what he points out is we are not seeking to
20 interfere with the contingent interest that the city does
21 have. It is merely that the property which is not the city's
22 property is the cash itself continue to be trapped, so that
23 is the distinction there which, again, folds back into our
24 argument that it's not property of the estate.

25 Your Honor, I have said my piece. I think we --

1 THE COURT: All right.

2 MR. HACKNEY: -- may have exhausted my knowledge
3 of --

4 THE COURT: Thank you.

5 MR. HACKNEY: -- bankruptcy law as well, so thank
6 you very much, your Honor.

7 THE COURT: Anyone else briefly without duplicating
8 what's already been said?

9 MR. NEAL: Yes, your Honor. Good afternoon again.
10 Guy Neal, Sidley Austin, counsel for National Public Finance
11 Guarantee Corp. I rise to echo or to -- to echo and to
12 underscore what Ms. Ball said about her reservations as it
13 relates to the special revenue determination, and without
14 treating this as a complete reservation of rights, which I
15 know is not something I need to do, I would encourage your
16 Honor to expressly reserve or avoid ruling on the issue of
17 whether or not these are special revenues such that they are
18 excepted from the automatic stay.

19 NPMFG, among others -- I think about 12 or 13
20 others -- have filed an objection to the swap forbearance
21 motion, will be an active participant in discovery, will
22 litigate this issue on the 9th, and those threshold issues
23 that are raised -- and there are just three of them, so I
24 will be brief -- that were raised in NPMFG's objection or
25 technically NPMFG's joinder to Ambac's objection is that the

1 swap obligations are unauthorized under state law and,
2 therefore, void. State law does not authorize the city to
3 pledge casino revenue to secure swap obligations, and, third,
4 the casino revenue does not constitute special revenue, and,
5 accordingly, the swap counterparties do not have a lien on
6 post-petition casino revenue. I think these were the same
7 three issues that Ms. Ball appropriately reserved on. Those
8 are issues to be -- that have been extensively briefed and
9 will be extensively argued and litigated on the 9th, so I
10 would ask your Honor in your ruling today not to foreclose
11 any argument -- or foreclose us -- excuse me -- and others
12 who, frankly, are not here in the courtroom today, including
13 Assured and Ambac this afternoon, to make these arguments on
14 the 9th.

15 THE COURT: Thank you, sir.

16 MR. NEAL: Thank you very much.

17 THE COURT: Mr. Gordon, you rose.

18 MR. GORDON: I did, your Honor, and the vagaries of
19 going second -- Mr. Neal said everything I wanted to say.

20 THE COURT: Thank you.

21 MR. GORDON: But just for the record, we support the
22 same position. It was our understanding that the arguments
23 today were simply as to whether the stay had any effect on
24 Syncora as a third party not standing in the shoes of a swap
25 participant. Those issues are really to be dealt with on the

1 9th. Thank you, your Honor.

2 THE COURT: Anybody else before we get back to Ms.
3 Ball? One more, yes.

4 MS. FLUKER: Good afternoon, your Honor. May it
5 please the Court, Vanessa Fluker standing in for the attorney
6 of record, Jerome Goldberg, on behalf of interested party
7 David Sole. I do concur with Ms. Ball's arguments. I would
8 just like to highlight a couple points that I think add
9 something to that, and that is, number one, that the gravamen
10 of this whole issue is whether we have a special revenue
11 here, and I think that is significant. Counsel for Syncora
12 made an argument about the escrow and was very eloquent, but
13 the bottom line is the escrow was created based on the
14 alleged lien that was on the revenue that came into the city
15 via the wagering taxes. Therefore, it's incumbent to be able
16 to ascertain whether, in fact, this is a special revenue
17 which, pursuant to statute, it obviously is. If you look not
18 only at the definition under 902, but also if you look at the
19 Michigan statute that allocates the revenue, it specifically
20 articulates purposes that the revenue could be used for,
21 including hiring, training of street patrol officers,
22 neighborhood, downtown economic developments. It's just a
23 laundry list of things that it could be used for, so to say
24 that it was specifically earmarked for the payment of Syncora
25 as a custodian, I think that is a far stretch, particularly

1 when you have statutes incorporating this.

2 THE COURT: Not on the list?

3 MS. FLUKER: That is correct. They're not on the
4 list, exactly. Therefore, we believe that obviously the stay
5 is applicable and just based on pure statutory construction
6 in addition to the collateral agreement itself that does not
7 specifically isolate all of these funds that would make it
8 constitute a special revenue as defined by Section 902. I do
9 concur, as I indicated, with Attorney Ball.

10 THE COURT: Thank you very much, ma'am. Ms. Ball.

11 MS. BALL: Thank you, your Honor. If I may, I rise
12 for, I think, a very short list of points, but two of them
13 are critical. I have a picture which I think lays out what
14 Mr. Hackney tried to describe to you. I have one for Mr.
15 Hackney as well. May I approach, your Honor?

16 THE COURT: Yes.

17 MS. BALL: I think your Honor has appropriately
18 cautioned Syncora regarding the fact that secured creditors
19 remain subject to the automatic stay even if they're the IRS.
20 Your Honor may recall Whiting Pools where the IRS had seized
21 property and similarly claimed it's no longer property of the
22 debtor. The Supreme Court has told us that's clearly not
23 true, and, in fact, as I mentioned to you earlier, Judge
24 Bennett in his assessment in Jefferson County as to whether
25 or not possession by the receiver removed revenues from the

1 estate of Jefferson County similarly concluded no.

2 But I want to get back to three things that Mr.
3 Hackney said. On this -- this picture, your Honor, has
4 nothing to do with any agreement other than the collateral
5 agreement, and all the payments that are required to be made
6 are not made under the service contract as alleged by Mr.
7 Hackney. As a matter of fact, there are payments that
8 casinos every day are directed to pay revenues into that
9 general receipt subaccount. Monthly under the collateral
10 agreement the payments are made by the city under the
11 collateral agreement into the holdback account. Once there
12 is a -- once the city makes that payment into the holdback
13 account, every day, not remote in the future, not at the end
14 of the year, every day casino revenues are released in that
15 monthly cycle, so payments -- monthly payments are made by
16 the city under the collateral agreement, never goes near the
17 service corp., the service contract. It's a contractual
18 obligation under the collateral agreement. Similarly, under
19 the collateral agreement, the city has the right to obtain a
20 release of its funds from the holdback from the general
21 receipts account every day until the next monthly cycle
22 begins, so the city has a contract right under the collateral
23 agreement to have monies released to it from -- its monies
24 released to it from the general receipts subaccount on a
25 daily basis every day in the month after it has made the

1 payment.

2 THE COURT: What paragraph of the agreement are you
3 referring to?

4 MS. BALL: Pardon?

5 THE COURT: I'm sorry. What paragraph of the
6 agreement are you --

7 MS. BALL: Paragraph 5.2 of the collateral
8 agreement, your Honor. And then the payments to the city
9 from the holdback account are in Section 5.5, so everything
10 works here in a closed circle under this agreement that
11 Syncora is not a party to.

12 The other point which I think goes to the
13 application of special revenues to indebtedness, again,
14 assuming arguendo that the special -- that the casino
15 revenues are special revenues, the only obligation for which
16 the casino revenues stand as collateral is the hedge payable,
17 payments under the swap, very clear in the grant of the
18 security interest under the collateral agreement that that is
19 the scope of the city pledge, and that is in Section 4.1.
20 While I know it has been -- well, I don't know. It just
21 seems that it's been fundamental to the approach that my
22 colleagues representing Syncora have taken that this really
23 is a complex, interrelated, multiple, multi-party, everybody
24 is in the game situation, your Honor, that world changed, and
25 it changed radically in 2009. And what changed in 2009? And

1 I want to get to the Syncora consent.

2 What happened in 2009 was, your Honor may be aware
3 from all the papers, there was a downgrade of the city, but
4 the city wasn't the only one on its heels. The insurers had
5 been downgraded, and there had been an insurer event under
6 the swap as well, so here everyone was facing the prospect in
7 2009 of a massive default by the city and a massive amount of
8 money due. The city did the responsible thing. The banks
9 kind of had everybody. We were all on our heels, the city,
10 Syncora, FGIC. Nobody was in tremendous shape in 2009. I'm
11 sure it's a time that your Honor recalls well, particularly
12 in this part of the country.

13 So what happened in 2009? We've heard a lot about
14 the banks got collateral. Well, that's true, and I want to
15 come back to that. Two major things happened in 2009. We
16 focused on one. One was the city gave the swap
17 counterparties collateral in this closed circuit agreement
18 under a document which was not only -- the insurers weren't a
19 party to it, but, your Honor, also the city was very careful.
20 Kudos to them. In the section that my colleagues are so wont
21 to quote to your Honor, which the rest of us might refer to
22 as a merger clause, you know, Section 14, 14(a), that all
23 these other documents constitute the entire agreement of the
24 parties, it's very interesting because only three places --
25 and I would dare our colleagues to find more -- where the

1 word "insurer" is even mentioned in the collateral agreement,
2 and it's mentioned in the merger section. You know what it
3 says? This section does not apply to any rights and
4 obligations of the insurers. The insurers had nothing to do
5 with the collateral agreement. Why? Because a second change
6 happened in 2009. And, your Honor, it was very obvious
7 because the ordinance of the city in that summer of 2009 had
8 a term sheet, and the term sheet kind of highlighted it very
9 nicely. It laid out in gory detail the fact that the city
10 was now going to pay a higher rate of interest to the banks.
11 It was going to put up collateral. But it also provided for
12 the end of the hedge. It severed the tie between the COP's,
13 which are the certificates of participation, insure the other
14 insurance obligation by Syncora that has nothing to do with
15 the swaps, and Syncora disagrees with that construction, but
16 it, in essence, said to the banks you get a free -- get out
17 of jail free card. You can walk away from these swaps
18 anytime you want, and, you know, your Honor, when do you
19 think a rational financial player is going to walk away from
20 those swaps? When they're going to be out of the money for
21 the banks. So rather than ever have to pay a nickel, the
22 banks got the right to just wash their hands and say, "We
23 walk." Well, that's a radical change, your Honor. That
24 meant that the hedge could never really be a value to the
25 city. It was never going -- to the service corps. Excuse

25 THE COURT: Okay. So what does this have to do with

1 whether the stay is applicable --

2 MS. BALL: Your Honor, it goes to the --

3 THE COURT: -- in the circumstances that we're
4 talking about here?

5 MS. BALL: Sorry. It goes to any debt unpaid on the
6 COP's or the service are so far afield from this pledge and
7 should not be countenance in the context of suggesting that
8 922(d) is applicable here. It is only payments under the
9 swap, and they have all been timely made. And all the
10 payments in our contract rights to get the release of
11 revenues are under the collateral agreement, and that's a
12 right that we believe the automatic stay and the stay of
13 Chapter 9 protect. It is not a very complicated series of
14 many other things. The city pays every month. Thereafter
15 every day they get their revenues, their tax revenues. Your
16 Honor, I think there should be no doubt that it remains
17 property of the city throughout, and I think, as I said
18 earlier, the remedy section of the collateral agreement,
19 which is the only way to get remedies should they trap, also
20 provides that you have to go through all the hoops to get to
21 that property because it's city property, and you only get
22 there by appropriation. So to suggest that it ever ceases
23 being property of the city is totally contrary to this
24 agreement, which is the agreement by which these revenues are
25 delivered to the custodian. I can see I've worn out my

1 welcome. I'm sorry. Thank you.

2 THE COURT: Thank you.

3 MS. BALL: Do you have any questions?

4 MR. HACKNEY: Just a brief rebuttal.

5 THE COURT: Yes, sir.

6 MR. HACKNEY: I will resist the temptation. I'm not
7 always good at resisting temptations, but I'm not going to
8 argue the way the structure works and our interpretation
9 because it's super technical, and I don't believe it's
10 germane here, so I'm going to just respectfully disagree with
11 Ms. Ball.

12 But I want to address the diagram because you'll
13 remember that in my argument I said that the payments under
14 the service contract which the city pledged definitely
15 secures had all accelerated so that there is a disagreement
16 with us with their contention that the city is current.
17 They're holding this diagram up to say, no, look, the amounts
18 go directly to the counterparties from the holdback account.
19 I only want to tell you that this is a very technical point,
20 but under Section 5.7(a)(1) of the collateral agreement, it
21 says "payments to the counterparties and the custodian from
22 the holdback account," and it says, "The custodian shall pay
23 to the counterparties from the holdback account at the end of
24 each quarterly period" -- so these are the three months that
25 have now stacked up -- an amount equal to all hedge periodic

1 payables, capital HPP. Hedge periodic payables are defined
2 in the service contract as a periodic amount owing by the
3 corporation under a stated hedge, so the only reason I'm
4 making this hypertechnical point is to say that to the extent
5 these payments are made to the counterparties, they are made
6 for the ultimate benefit of the service corporation, which
7 is, of course, the party to the swap.

8 The only other limited point I wanted to make, your
9 Honor, is that in Section 14.14 where Ms. Ball said there's
10 this sort of curious reference to Syncora, it says words to
11 the effect of Syncora's rights and obligations shall be
12 unaffected by -- this section does not apply to any rights or
13 obligations of the capital line insurers. This is the
14 integration provision of the collateral agreement.
15 Obviously, a quick reminder that the swap itself references
16 the collateral agreement, the services contracts, and the
17 contract administration agreements as credit support
18 documents, so there's integration on that end as well, but
19 more importantly, I think all this is doing is noting that
20 Syncora's insurance obligation contracts are not referenced
21 in the various documents that are part of the integration,
22 and we are not claiming that we're coming through one of our
23 insurance documents and exercising direct rights. We are
24 claiming that we have enforcement and consent and direction
25 rights as third-party beneficiaries explicitly in the

1 agreements. That's all I think that provision is designed to
2 do. Thank you for your patience today, your Honor.

3 THE COURT: All right. The Court will take this
4 under advisement and either written -- either issue a written
5 opinion before next Wednesday or give it to you on the record
6 at that time when we reconvene on the discovery and
7 disclosure issue.

8 MR. HACKNEY: Your Honor, if I could say --

9 THE COURT: One thing -- sir.

10 MR. HACKNEY: I'm sorry. Just to the extent there
11 was any failing in my presentation today to respond to some
12 of your questions, I wanted you to know that we would be
13 happy to submit additional pleadings. I know that you get a
14 lot of pleadings every day, but --

15 THE COURT: Okay.

16 MR. HACKNEY: -- there were some questions you posed
17 that if you'd like more, we'd be happy to prepare --

18 THE COURT: In the meantime, the Court will maintain
19 the status quo, whatever that is. At some point, in light of
20 the city's agreement to dissolve the TRO perhaps after the
21 court rules on the stay motion, the two of you can prepare an
22 order and submit it to the Court that accomplishes that.

23 There is one more matter that I want to discuss with
24 certain parties, and I'm looking at the -- what?

25 MS. CALTON: I'm sorry. On the order dissolving the

1 injunction, could they circulate it to the casino so we can
2 make sure the language protects us for making payments in the
3 interim and not be at risk to have to pay them a second time?

4 THE COURT: Any objection to that?

5 MR. SHUMAKER: No, your Honor.

6 MR. HACKNEY: No.

7 MS. CALTON: Thank you.

8 THE COURT: You're welcome. Okay. So I want to
9 have a conversation with certain attorneys but not with
10 everyone, so I need a show of hands. Who here represents
11 parties who are signatories to any of the agreements that
12 have been discussed here today? Okay. If your hand is not
13 raised, I'm going to ask you to leave the courtroom at this
14 time. That includes members of the press and the public.
15 I'm going to ask you to leave the courtroom at this time if
16 you do not represent a party to one of these agreements.
17 Turn it off. Turn it off. We're going to turn off CourtCall
18 and the overflow courtroom communication as well.

19 (Proceedings concluded at 4:25 p.m.)

INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

August 29, 2013

Lois Garrett

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846
MICHIGAN, .
 . Detroit, Michigan
 . August 28, 2013
Debtor. . 10:00 a.m.

HEARING RE. OPINION RE. STAY ISSUE

STATUS HEARING RE. CORRECTED MOTION TO ASSUME LEASE OR
EXECUTORY CONTRACT

MOTION FOR PROTECTIVE ORDER

ADVERSARY PROCEEDING 13-04942 - STATUS CONFERENCE

BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Jones Day
By: GREGORY M. SHUMAKER
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113
(202) 879-3679

Jones Day
By: CORINNE BALL
222 East 41st Street
New York, NY 10017-6702
(212) 326-7844

For Syncora Hold- Kirkland & Ellis, LLP
ings, Ltd., Syncora By: STEPHEN C. HACKNEY
Guarantee, Inc., 300 North LaSalle
and Syncora Capital Chicago, IL 60654
Assurance, Inc.: (312) 862-2074

For Detroit Honigman, Miller, Schwartz & Cohn, LLP
Entertainment, LLC- By: JUDY B. CALTON
Motor City Casino 660 Woodward Avenue, Suite 2290
and Greektown Detroit, MI 48226
Casino, LLC: (313) 465-7344

APPEARANCES (continued):

For Ambac Assurance Arent Fox, LLP
 Corporation: By: CAROLINE TURNER ENGLISH
 1717 K Street, N.W.
 Washington, DC 20036-5342
 (202) 857-6178

For Financial Weil, Gotshal & Manges, LLP
 Guaranty Insurance By: ALFREDO R. PEREZ
 Company: 700 Louisiana, Suite 1600
 Houston, TX 77002
 (713) 546-5040

For Erste Ballard Spahr, LLP
 Europaische By: VINCENT J. MARRIOTT, III
 Pfandbrief-und 1735 Market Street, 51st Floor
 Kommunalkreditbank Philadelphia, PA 19103-7599
 Aktiengesellschaft (215) 864-8236
 in Luxemburg, S.A.:

For FMS: Schiff Hardin, LLP
 By: RICK L. FRIMMER
 233 S. Wacker Drive, Suite 6600
 Chicago, IL 60606
 (312) 258-5511

For Retiree Lippitt O'Keefe, PLLC
 Association By: RYAN C. PLECHA
 Parties (Retired 370 East Maple Road, 3rd Floor
 Detroit Police & Birmingham, MI 48009
 Fire Fighters (248) 723-6263
 Association,
 Donald Taylor,
 individually and
 as President of
 the RDPFFA, the
 Detroit Retired
 City Employees
 Association and
 Shirley V.
 Lightsey,
 individually and
 as President of
 the DRCEA):

Court Recorder: Letrice Calloway
United States Bankruptcy Court
211 West Fort Street
21st Floor
Detroit, MI 48226-3211
(313) 234-0068

Transcribed By: Lois Garrett
1290 West Barnes Road
Leslie, MI 49251
(517) 676-5092

Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

1 THE CLERK: All rise. Court is in session. Please
2 be seated. Case Number 13-53846, City of Detroit, Michigan,
3 and Case Number 13-04942, City of Detroit versus Syncora
4 Guarantee, Incorporated, et al.

5 THE COURT: Okay. I'd like to begin with
6 administering the oath of admission to attorneys who seek
7 admission to the Bar of the Court. I think we have one
8 today, Ms. Newbury.

9 MS. NEWBURY: Good morning, your Honor.

10 THE COURT: Good morning. And you are Ms. Newbury?

11 MS. NEWBURY: Yes, I am. Karen Newbury.

12 THE COURT: And are you prepared to take the oath of
13 admission to the Bar of the Court?

14 MS. NEWBURY: Yes, I am, your Honor.

15 THE COURT: Please raise your right hand. Do you
16 affirm that you will conduct yourself as an attorney and
17 counselor of this Court with integrity and respect for the
18 law, that you have read and will abide by the civility
19 principles approved by the Court, and that you will support
20 and defend the Constitution and laws of the United States?

21 MS. NEWBURY: I do, your Honor.

22 THE COURT: Welcome.

23 MS. NEWBURY: Thank you.

24 THE COURT: We'll take care of your paperwork for
25 you.

1 MS. NEWBURY: Thank you very much.

2 THE COURT: Okay. One moment, please. Okay. So in
3 terms of our order of proceeding today, I thought we would
4 start with the Court's opinion regarding the stay issue and
5 Syncora, and then we would do the status conference on the
6 Syncora adversary proceeding, and then the status conference
7 on the motion to assume and then the city's motion for a
8 protective order regarding the data room and then if there's
9 anything else anyone would like to bring up. Is that order
10 okay with everybody? Okay. Perhaps so the record is clear,
11 we should just take appearances in regard to this stay issue
12 for the record.

13 MS. BALL: Good morning, your Honor. Corinne Ball
14 for the City of Detroit.

15 MR. HACKNEY: Good morning, your Honor. Nice to see
16 you again. It's Steve Hackney on behalf of Syncora.

17 THE COURT: All right. Thank you. The issue before
18 the Court is whether the casino revenues in the subaccount
19 held by U.S. Bank are property of the city protected by the
20 automatic stay. It is the position of Syncora that these
21 casino revenues in this account held by U.S. Bank are not
22 property of the city. In the alternative, Syncora contends
23 that either Section 362(b)(17) or Section 922(d) of the
24 Bankruptcy Code apply to provide an exception to the
25 automatic stay. The city contends that these funds are

1 property of the city.

2 Section 362(a)(3) of the Bankruptcy Code stays any
3 act to obtain possession of property of the estate or of
4 property from the estate or to exercise control over property
5 of the estate. Section 902(1) makes the references in
6 362(a)(3) to property of the estate to mean property of the
7 debtor. So the application of the stay depends on whether
8 the property is property of the city.

9 Syncora argues that the subaccount in which the
10 casino revenues are held is similar to an escrow account,
11 and, therefore, the funds in the account are not property of
12 the city. Under New York law, apparently applicable here, an
13 escrow is defined as, quote, "a written instrument which by
14 its terms imports a legal obligation and which is deposited
15 by the grantor, promisor, or obligor and -- or against
16 thereof, with a stranger or third party to be kept by the
17 depository until the performance of a condition or the
18 happening of a certain event. The escrow relationship is of
19 a fiduciary nature and has some characteristics of a trust,"
20 close quote. This is from -- excuse me -- 55 New York
21 Jurisprudence 2d Escrows Section 1. With an escrow account,
22 the, quote, "incidents of ownership remain in the person
23 depositing the property into escrow until the conditions of
24 the escrow are fulfilled," close quote, 55 New York
25 Jurisprudence 2d Escrows Section 9. See also 99 Commercial

1 Street, Inc. v. Goldberg, 811 F. Supp. 900 at 906, Southern
2 District of New York, 1993.

3 Pursuant to the collateral agreement, the casino
4 deposit -- the casino deposits -- sorry -- the casinos
5 deposit the funds owed to the city into the subaccount. For
6 the subaccount to be an escrow account, as Syncora argues,
7 the arrangement would have to be such that the casinos would
8 retain ownership of the funds; however, there is simply no
9 basis in the collateral agreement for such a finding.

10 Likewise, there is no support for Syncora's
11 alternative argument that U.S. Bank, as the custodian, owns
12 the funds. The fact that the city is not in possession of
13 the casino revenues is of no consequence in determining
14 whether they are the city's property. See, for example,
15 United States versus Whiting Pools, Inc., 462 U.S. 198, 103
16 Supreme Court Reporter 2309, 1983. The Court must conclude
17 that the casino revenues are, under applicable state law,
18 property of the city.

19 Section 362(b)(17) of the Bankruptcy Code exempts
20 from the automatic stay, quote, "the exercise by a swap
21 participant or a financial participant of any contractual
22 right (as defined in section 560) under any security
23 agreement or arrangement or other credit enhancement forming
24 a part of or related to any swap agreement, or of any
25 contractual right (as defined in section 560) to offset or

1 net out any termination value, payment amount, or other
2 transfer obligation arising under or in connection with 1 or
3 more such agreements, including any master agreement for such
4 agreements."

5 Section 101(53C) of the Bankruptcy Code defines swap
6 participant as, quote, "an entity that, at any time before
7 the filing of the petition, has an outstanding swap agreement
8 with the debtor," close quote.

9 It is Syncora's position that the swap
10 counterparties are swap participants and that Syncora has the
11 right to direct the actions of the swap counterparties under
12 the collateral agreement and that, therefore, any action
13 taken by the swap counterparties at the direction of Syncora
14 is not subject to the automatic stay. Syncora also contends
15 that because it is a third-party beneficiary of the
16 collateral agreement, it is a swap participant. The Court
17 concludes, however, that there is no legal support for either
18 of Syncora's arguments. Syncora is not a swap participant as
19 that term is defined by the Bankruptcy Code, and the Court
20 concludes, therefore, that it cannot rely on Section
21 362(b)(17). If Congress had intended to include a party like
22 Syncora within the definition of a swap participant on the
23 grounds that Syncora now asserts, Congress could readily have
24 done that with more expansive language, but it did not.
25 Instead, it limited the definition to those who have swap

1 agreements with the debtor, which Syncora does not.

2 Lastly, Syncora argues that Section 922(d) of the
3 Bankruptcy Code is applicable. That section provides, quote,
4 "Notwithstanding section 362 of this title and subsection (a)
5 of this section, a petition filed under this chapter does not
6 operate as a stay of application of pledged special revenues
7 in a manner consistent with section 927 of this title to
8 payment of indebtedness secured by such revenues." Assuming,
9 without deciding, that the funds on deposit with U.S. Bank
10 are special revenues, this section is inapplicable. Syncora
11 does not have a lien on the revenues. Further, the
12 accumulation of the funds in the subaccount is not the,
13 quote, "application of special pledged revenues to the
14 payment of indebtedness," close quote. It is merely an
15 administrative act. Therefore, there is no indebtedness to
16 Syncora here.

17 Accordingly, the Court concludes that the casino
18 revenues are protected by the automatic stay. The Court will
19 prepare and enter an order to that effect. This order will,
20 of course, be without prejudice to the right of any party to
21 seek relief from the stay under Section 362(d).

22 So let's turn then to the adversary proceeding. In
23 light of this order, is the city prepared to dismiss the
24 adversary proceeding against Syncora and others?

25 MR. SHUMAKER: Your Honor, Gregory Shumaker of Jones

1 Day, for the record. It's a pleasure to be here. Your
2 Honor, the answer to your question is -- well, first is --
3 I'm not -- we obviously just heard your ruling, so a final
4 determination as to whether we might be able to dismiss the
5 case -- we would appreciate the opportunity to do that.
6 We're not sure if your Honor's ruling, however, covers all of
7 the factual findings that we would need and the declaratory
8 judgment that the city is seeking with regard to Syncora's
9 rights vis-a-vis the collateral agreement and the casino
10 revenues, and so I think that that determination remains
11 outstanding as does Syncora's lawsuit against the swap
12 counterparties in New York where they will be seeking a
13 similar -- and currently seek a similar -- not a similar
14 declaration, but a declaration of their rights -- a
15 declaratory judgment as to their rights. We also -- so I
16 believe we still have the need to get those rights
17 adjudicated finally, all of the rights that are asserted by,
18 for example, Syncora in its motion -- its pending motion to
19 dismiss. The New York action, too, remains out there. It's
20 subject to a motion to transfer it to this Court. When -- if
21 and when that action were to come here, perhaps a
22 consolidation would be appropriate, but, in any event, I'm
23 not -- I can't tell you right now, your Honor, that the city
24 is amenable to a dismissal because we --

25 THE COURT: So if the motion to assume is denied,

1 that would moot out those claims as well; right?

2 MR. SHUMAKER: Well, it would depend on why your
3 Honor denied it, I presume. There are multiple objections to
4 the assumption motion. If it had to do with Syncora's
5 rights, I think there is some question as to whether you will
6 be making findings in that regard. We believe that you
7 should, but we -- based upon earlier comments from your
8 Honor, that seems to still be a question as to the --

9 THE COURT: Can you be more specific about what you
10 want declared in the adversary proceeding?

11 MR. SHUMAKER: Well, in the adversary proceeding
12 right now, it's a little bit complicated, your Honor,
13 because, if you'll recall, the adversary proceeding was filed
14 prior to the forbearance and optional termination agreement
15 being executed. In fact, we pursued that so that the
16 forbearance agreement could be executed -- or negotiated,
17 finalized, and executed. So right now the TRO that we
18 discussed last week relates to the city's allegations about
19 the irreparable harm that it would suffer if the casino
20 revenues were attached. Syncora has, in response to that
21 complaint, filed a motion to dismiss, which asserts a broader
22 set of rights to the casino revenues based not only on the
23 collateral agreement but a number of other agreements, which
24 your Honor is probably all too aware of at this point, but,
25 you know, if the city would need to amend its complaint in

1 order to deal with those broader issues, I'm not sure, but
2 the New York action that is still out there, your Honor, is a
3 post-forbearance agreement suit, and it may or may not come
4 here, so it's a bit complicated. And I'm not sure that your
5 ruling is going to -- on the assumption motion is going to
6 address that adjudication of rights.

7 THE COURT: Okay. So presently pending in the
8 adversary are the two motions that we've been discussing, the
9 motion to dismiss and the motion for a protective order; is
10 that right?

11 MR. SHUMAKER: That's correct, your Honor. The
12 motion to dismiss is not yet fully briefed. The city filed
13 its reply brief earlier this week or late last week, and then
14 the motion for protective order emanated from the discovery
15 that Syncora sought back in the beginning of July, which we
16 believe for a number of reasons was oppressive, and we should
17 not be required to go through that.

18 THE COURT: Is it premature to set hearing dates on
19 those two motions?

20 MR. SHUMAKER: Well, your Honor, I believe that the
21 motion to dismiss reply brief is due September 12th, and
22 certainly at that time that would be --

23 THE COURT: Obviously --

24 MR. SHUMAKER: -- I would think a threshold issue.

25 THE COURT: Obviously after that.

1 MR. SHUMAKER: Yes, your Honor, because I presume
2 you would want to adjudicate that prior to discovery
3 proceeding, if you will.

4 THE COURT: All right. We'll have to work with my
5 schedule and the district courtroom's availability to provide
6 you with a date. Mr. Hackney, would you concur that after
7 September 12 we can set hearings on these two motions?

8 MR. HACKNEY: Absolutely, your Honor. If I could --
9 I guess I have a couple quick observations --

10 THE COURT: Sure.

11 MR. HACKNEY: -- that might facilitate things. I
12 guess it seems to me that the TRO is dissolved and that
13 logically that the preliminary injunction motion would be
14 withdrawn. Now, if I'm wrong about that, I'll --

15 THE COURT: Well, let's inquire.

16 MR. SHUMAKER: With the stay in place, your Honor,
17 that would be fair, yes.

18 THE COURT: All right. There you go.

19 MR. HACKNEY: The protective order -- the discovery
20 we sought was principally in connection with the anticipated
21 preliminary injunction hearing that we might have. If there
22 is no preliminary injunction hearing, I do not believe that
23 there is a need for expedited interim discovery. I would
24 instead propose that we proceed in the normal course under a
25 Rule 26 discovery conference, so I view that as sort of

1 mooting the protective order issues. I had a --

2 THE COURT: Would you concur with that, sir?

3 MR. SHUMAKER: I would, your Honor.

4 THE COURT: All right. So all we'll set for hearing
5 is the motion to dismiss.

6 MR. HACKNEY: That hopefully streamlines things,
7 your Honor.

8 THE COURT: Good. Thank you.

9 MR. HACKNEY: I had a -- I did have a favor to ask,
10 which is we've been running relatively hard. We are able to
11 do two things at once, but I will tell you we've been
12 relatively busy. I was wondering if I could have an
13 extension of time of four days until September 16th to do our
14 reply brief. The briefs in this --

15 THE COURT: Any objections?

16 MR. SHUMAKER: No, your Honor.

17 MR. HACKNEY: And then we would, of course, be
18 willing to argue before -- subsequent to that time.

19 THE COURT: All right.

20 MR. HACKNEY: And those were all of the issues that
21 I had to discuss today.

22 THE COURT: Okay.

23 MR. HACKNEY: Thank you.

24 THE COURT: Okay. All right. In regard to the
25 motion to assume, is there -- are there any issues or

1 comments or suggestions that anyone would like to make in
2 regard to that?

3 MR. SHUMAKER: Your Honor, there are a few scattered
4 issues. I should apprise your Honor of this. You may have
5 noticed that deposition notices were filed. Mr. Buckfire's
6 deposition is scheduled for 9:30 tomorrow morning, and Mr.
7 Orr's deposition is set for Friday at 8:30. One issue that's
8 arisen as the -- and I've been dealing with Mr. Hackney,
9 who's been the liaison for the objectors -- is consistent
10 with your Honor's guidelines or at least proposed guidelines
11 for the September 9th hearing where we -- where the
12 suggestion, I believe, your Honor, was three hours for the
13 city to put on its case and then the objectors three hours to
14 respond. We were -- one of the things that we did was we
15 withdrew one of the proposed witnesses, Gaurav Malhotra, who
16 is with Ernst & Young, who submitted a declaration on the
17 first day. We did that to -- because we wanted to
18 consolidate. We know that this is not supposed to be a mini
19 trial. Your Honor really was not looking for, I think,
20 extensive discovery and had the debtor put forward its
21 witnesses, and those depositions are the ones that are going
22 to occur. We withdrew that. There seems to be a developing
23 question as to whether the Court can take judicial notice of
24 Mr. Malhotra's first day declaration, which is in the record.
25 There are a few paragraphs that relate to the COP's and the

1 swaps and the assumption motion. I'm not -- we've had some
2 discussions earlier today just before coming into court. If
3 your Honor is able to do that, wants to take judicial notice
4 of Mr. Malhotra's testimony, then we would continue to leave
5 him off. If your Honor, however, believes that he needs to
6 appear as a witness and in order for that declaration to
7 get -- gain weight from the Court, which it would have if we
8 had not had discovery presumably, then I think we would have
9 to revisit the notion of Mr. Malhotra's presence on our
10 witness list.

11 THE COURT: Well, I'm certainly willing to take
12 judicial notice of the fact that there is an affidavit there,
13 but that's not particularly pertinent. You want me to take
14 judicial notice of the facts that he asserts in his
15 affidavit?

16 MR. SHUMAKER: Well, as you would have, your Honor,
17 if there had not been discovery. If you had -- if you had --
18 if you had proceeded on the papers for the assumption motion,
19 you would have considered the declaration and given it
20 whatever weight you believe necessary. And given the --

21 THE COURT: Well, but that's subject to the
22 opportunity of the opposing parties to question the witness.

23 MR. SHUMAKER: I guess if you were then going -- if
24 you were going to look at the city's motion to assume and
25 then have discovery on it, but at least it was my

1 understanding, your Honor, that you were limiting that
2 discovery to just the debtor's witnesses that were going to
3 appear at the hearing so that the objectors would have some
4 idea of what -- how they would cross-examine the witness as
5 opposed to, you know, reopening the issue of what evidence
6 had been submitted to your Honor in connection with the
7 motion.

8 THE COURT: Well, the Rules of Evidence apply, and
9 what he says in his affidavit is hearsay even though it's in
10 a court-filed document, so unless the parties opposing -- all
11 of them are willing to waive that hearsay objection, which I
12 would doubt, I would have to sustain any effort on your --
13 sustain an objection to any effort on your part to offer it
14 into evidence to prove the truth of any of the matters
15 asserted in it.

16 MR. SHUMAKER: Your Honor, if that's your ruling,
17 then I would ask if we could reserve the right to put Mr.
18 Malhotra back on our witness list and schedule a deposition
19 for him. Now, the deadline that you previously set was
20 August 30th. I'm not certain of his availability at the
21 moment. If that deposition moved a couple days into next
22 week, would that be all right with your Honor?

23 THE COURT: It's fine with me so long as we can
24 stand firm with our hearing date.

25 MR. SHUMAKER: Sure, sure. And I presume we could

1 do that. As your Honor knows, after Mr. Orr's deposition
2 concludes on Friday, the rebuttal witnesses will be named
3 within 24 hours, so those will be going on at the same time.

4 THE COURT: Mr. Hackney.

5 MR. HACKNEY: Well, I guess I'll just say that I
6 think the city made a decision about what witnesses it was
7 going to call, and it withdrew one of them, and now it's
8 regretting the evidential implications for the hearing, and
9 so I guess for me it's simple, which is when they decided to
10 withdraw Mr. Malhotra, they took him off the case as someone
11 that they could call at the hearing, and now they're asking
12 you to amend the discovery schedule that they previously, I
13 think, were agreeable to because of their decision to
14 withdraw him, so I guess I don't follow the cause for it.
15 That's all I'll say, your Honor. We'll be guided by your
16 decision.

17 THE COURT: Well, the question the Court needs to
18 address in these circumstances is how would the city's
19 changing its mind again prejudice your presentation or the
20 presentation of others at the hearing?

21 MR. HACKNEY: Yeah. And I guess the answer to
22 that -- I mean I've been coordinating all these folks, and
23 we've actually been working well in concert together. I want
24 to share credit with the other objectors. It's been very
25 constructive. It's not that easy.

1 THE COURT: Right.

2 MR. HACKNEY: And so what we've been trying to do is
3 be orderly in the way we depose these witnesses so it's not
4 just this chaotic deposition, and so when Malhotra came off,
5 a lot of prep for that deposition didn't happen. If he went
6 back on, we would want it to be sometime after the Labor Day
7 holiday so that whomever can get ready for it. That's, I
8 guess -- I wouldn't want to try and jam it into this week. I
9 would want it to be like on Thursday or Friday of that
10 following week just so whomever -- in light of the holiday
11 and et cetera.

12 THE COURT: Okay.

13 MR. HACKNEY: Sorry, your Honor.

14 THE COURT: No. I appreciate it and understand it.

15 MR. PEREZ: Good morning, your Honor. Alfredo
16 Perez. I represent FGIC. Two things, your Honor. With
17 respect to how you want the evidence presented, one of the
18 things that we would like to do is to make a presentation
19 with respect to how the swaps work in connection with the
20 COP's. And we could certainly do that through a witness, but
21 I think, since it's a matter of, you know, reading the
22 documents, if the Court would indulge just a straightforward
23 presentation, that might expedite things. I don't think it's
24 particularly -- it would be particularly controversial, so
25 that's one thing.

1 THE COURT: Well, if you don't think it would be
2 controversial, what I would encourage you to do is work with
3 the city on a joint statement.

4 MR. PEREZ: We can certainly do that, your Honor.
5 Then the other thing, your Honor, is I was tasked by the
6 various objectors to file a statement yesterday requesting
7 some additional time, and --

8 THE COURT: I saw that.

9 MR. PEREZ: And, your Honor, we would -- if the
10 issue were just the objectors versus the city, I think that
11 we could certainly comply -- fully comply and do a good job
12 for our clients, but there are -- as between the objectors,
13 there's really a lot of different issues, and, in fact, you
14 know, we're much more aligned with Syncora than we are with
15 anybody else since Syncora and FGIC are the only two people
16 who actually insure the swaps, so I would request additional
17 time with respect to that, your Honor.

18 THE COURT: Six hours?

19 MR. PEREZ: I think we could do it in six hours,
20 your Honor.

21 THE COURT: You're dubious about even that?

22 MR. PEREZ: Well, it depends. Let me give you --
23 and that's why I asked the first question.

24 THE COURT: Fully understanding that the issue here
25 is only whether to assume or reject this. It has -- the

1 issue is not who has what rights under this contract.

2 MR. PEREZ: I understand that, your Honor, but I
3 think in order -- in order for us to do a good job of
4 presenting whether we think -- you know, basically the facts
5 so that we can argue them to the Court, I really -- we really
6 kind of do think that the Court needs to understand the
7 transaction, and it's a complicated transaction.

8 THE COURT: Well, but you're going to come up with a
9 joint statement with the debtor on that point.

10 MR. PEREZ: Well, we're certainly going to try.

11 THE COURT: Let's negotiate. Five hours, and you
12 come up with a joint statement.

13 MR. PEREZ: We'll do that, your Honor. Thank you.

14 THE COURT: Anything else in regard to preparation
15 for the hearing on the motion to assume? Sir.

16 MR. MARRIOTT: Briefly, your Honor. Vince Marriott,
17 Ballard Spahr, on behalf of EEPK. I would just like to echo
18 Mr. Hackney's observation that coordinating preparation for
19 these depositions among the objectors has been a complicated
20 process, and we've been designating who's going to prepare
21 for what, and Ballard Spahr has been heavily involved in that
22 process. When that one witness came off, it did affect the
23 preparation. And if the witness is going back on, we really
24 do need time to sort of reload in preparing for that witness.

25 THE COURT: Yes. Thank you. Let me just ask will

1 this witness be available Thursday or Friday of next week?

2 MR. SHUMAKER: Your Honor, I don't know, but I will
3 certainly attempt to make him available then.

4 THE COURT: Well, doesn't he pretty much have to be
5 in order for our hearing date to proceed and to --

6 MR. SHUMAKER: Yes. You know --

7 THE COURT: -- give the objecting parties the time
8 they have requested?

9 MR. SHUMAKER: So the request, your Honor, just so
10 I'm clear, is that it's on Thursday or Friday of next week.

11 THE COURT: That's what I heard.

12 MR. SHUMAKER: Okay.

13 THE COURT: Okay.

14 MR. SHUMAKER: I don't know of him being out of the
15 country or anything like that, your Honor, but I'll do
16 everything within my power to make that happen. And I'm sure
17 the odds are extremely low that he would not be available.

18 THE COURT: Well, I hope you understand that if he's
19 not available for deposition, it will be challenging to
20 establish that he should be called as a witness.

21 MR. SHUMAKER: Understood, your Honor. Understood.

22 THE COURT: Sir.

23 MR. FRIMMER: Good morning, your Honor. Rick
24 Frimmer from Schiff Hardin representing FMS Wertmanagement,
25 which was incorrectly listed previously as DEPFA Bank, PLC.

1 THE COURT: Okay.

2 MR. FRIMMER: I almost hesitate to do this, but just
3 to remind counsel that next Thursday and Friday are the
4 Jewish holidays. Some of us won't be available. So whether
5 or not the witness is available does cause of a bit of a
6 monkeywrench for some of the other players, so --

7 THE COURT: That's a problem.

8 MR. FRIMMER: -- I just wanted the Court and the
9 counsel to be sensitive to that.

10 THE COURT: Well, let me ask is Wednesday an
11 acceptable day, and can you all prepare in time for the
12 deposition on that date?

13 MR. FRIMMER: As Mr. Hackney correctly noted, we've
14 been trying to work together to coordinate this. I'm sure
15 someone will be available. I just wanted to alert the Court
16 just to remind everybody that some portion of the populous
17 here will not be available.

18 MS. ENGLISH: Good morning, your Honor. Caroline
19 English from Arent Fox on behalf of Ambac. Just to point out
20 another wrinkle, if Malhotra testifies, we need the right to
21 call a potential rebuttal witness, which is going to put more
22 time into the schedule, and right now our hearing is
23 scheduled for Monday. Thank you, your Honor.

24 THE COURT: I was wondering when that issue was
25 going to arise.

1 MR. HACKNEY: Your Honor --

2 THE COURT: Sir.

3 MR. HACKNEY: I was wondering. I guess I'd like to
4 stick my head in the lion's mouth, so to speak, because I
5 think the Court has been clear that you want to have this
6 hearing on September 9th, and I appreciate that. I
7 understand what you're trying to do. I really do. I've been
8 in situations before where it makes sense to hold the foot on
9 the accelerator, but I did want to make an observation to the
10 Court in light of two developments. One of them is that
11 today you held that the city is going to have at least
12 interim access to these casino revenues during its case, and,
13 second, under the forbearance agreement, what's ostensibly
14 driving the schedule and the hurry-up is the idea that if
15 they don't get a final and unappealable order by September
16 16th, which is 60 days from the commencement of the case, the
17 swap counterparties may terminate the forbearance agreement.
18 It's a fact today that they will not have a final and
19 unappealable order by September 16th. That is already
20 established. If the Court's order is final, it will be
21 appealable, and if it's not final and unappealable, then it
22 won't be final. I just raise this to ask a practical
23 question about whether or not we need to strictly adhere to
24 the schedule in light of some of the challenges it's posing.
25 And I also wanted to add one thing, your Honor, that may be

1 nearer and dearer to your heart, which is it impacts things
2 like the mediation. You know, I'm part of the Syncora team.
3 I'm not going to the mediation tomorrow because I have to be
4 in the deposition. I know Mr. Marriott was originally
5 planning to take the Buckfire deposition, but now he's going
6 to the mediation. We can do two things at once. We can take
7 depositions and mediate, but there is sometimes a desire to
8 see whether a mediation can be fruitful before parties take
9 up the time and expense of litigation, and it seems to me
10 that even a two- to three-week adjournment of the hearing may
11 solve many of the different issues that are coming up. Just
12 a suggestion, your Honor.

13 THE COURT: Anyone else want to say anything?

14 MR. SHUMAKER: Your Honor, one -- excuse me -- two
15 things. One, I've been asked to advise your Honor that a
16 retirees' committee has been formed and is, I think, in the
17 process of retaining counsel, who is here, Carole Neville of
18 Dentons, and I believe she may wish to address the Court, but
19 before she does, if I would, your Honor, if the objectors
20 would have five hours and Mr. Malhotra is on the slate for
21 the city, we'd ask this, that we be given an hour to make
22 sure that we could get his testimony because we were --

23 THE COURT: So you want four instead of three?

24 MR. SHUMAKER: Exactly, your Honor. One of our
25 considerations was how can we do three witnesses in three

1 hours.

2 THE COURT: Is he available next Wednesday?

3 MR. SHUMAKER: I can check on a break. I could
4 leave right now if your Honor would --

5 THE COURT: All right. I'm going to give you that
6 opportunity and sit here while you do that. Wait. What?
7 The issue is use of the telephone?

8 MR. HERTZBERG: He can't use it out in the hallway,
9 your Honor, under the rules of the District Court. He has to
10 go downstairs.

11 THE COURT: I will grant you relief from that --

12 MR. SHUMAKER: Thank you, your Honor. Be right
13 back.

14 THE COURT: -- and instruct the security personnel
15 to allow you to use your phone in the hallway.

16 MR. SHUMAKER: Thank you, your Honor.

17 THE COURT: Thank you, Mr. Hertzberg.

18 (Pause at 10:37 a.m., until 10:41 a.m.)

19 MR. HACKNEY: Your Honor, can I propose something to
20 the Court while we're waiting on this information?

21 THE COURT: Sure.

22 MR. HACKNEY: I understand the city's sensitivity on
23 the subject of the schedule because under the forbearance
24 agreement they have a best efforts obligation, best efforts
25 to try and get this final appealable order within 60 days, so

1 I respect the fact that they need to exercise best efforts,
2 but I think the objectors in the court, we don't have that
3 obligation, and what I would propose is that we continue the
4 hearing one month and that the city vigorously oppose my
5 motion for a continuance. And, your Honor, I think that may
6 allow for a number of things to happen that are potentially
7 conducive both to the use of your time, which is also
8 occupied by other matters, and to the coherence of the
9 presentation and to the mediation, and the city will comply
10 with its best efforts obligation to attempt to get a final
11 appealable order within 60 days, which, by the way, it
12 already cannot get, but it has used its best efforts.

13 THE COURT: Ms. Ball.

14 MS. BALL: Thank you, your Honor, with vigor. Your
15 Honor, Mr. Hackney has correctly calculated the dates, so I
16 cannot contest his description of where we will find
17 ourselves should your Honor approve the settlement and the
18 assumption of the forbearance agreement. We do also have the
19 obligation that Mr. Hackney has described as a best efforts
20 obligation. Your Honor, we have all tried mightily, and my
21 partner, Greg, is out trying to find out if we can do a
22 deposition on Wednesday. I certainly question whether a
23 month is necessary because, your Honor, there are other
24 economic provisions in the agreement, which Mr. Hackney may
25 not be as aware of at this point, but I'm sure by the time of

1 our hearing he will be, where some of the economic benefits
2 that we must obtain are important. But in fairness to your
3 Honor, our ability to obtain those economic benefits is in
4 some respects tied to two other events, which are on a
5 different schedule, and those two other events, your Honor,
6 you scheduled with an order earlier this week, the
7 eligibility hearing as well as, your Honor, any effort to
8 obtain -- and we are working mightily -- post-petition
9 financing. Actually funding it will likely require a
10 resolution of the eligibility issue. So we have not just the
11 parallel tracks of mediation and litigation. We actually
12 have the track -- if the city is going to get the benefit
13 of -- one of the reasons why it did this, clearly one, your
14 Honor's ruling -- we thank you; it was very important -- was
15 getting immediate access, continuing access to casino
16 revenues, and I certainly am grateful for your ruling and
17 don't want to under -- in any way understate the importance
18 of that. So, your Honor, I really question whether or not 30
19 days is appropriate. I do think that if -- in fairness to
20 the Court and in light of what you've already heard certainly
21 from Mr. Perez on behalf of FGIC and from Ambac as well as
22 Syncora, this is complicated, and a better presentation --
23 the more we work out in advance of this hearing, the better
24 off we will all be in terms of as much being stipulated facts
25 and a very short succinct but accurate joint statement. So

1 with that, your Honor, we are -- we will go forward on
2 September 9th assuming Mr. Malhotra is available on
3 Wednesday, but at my -- discharging my obligations to this
4 Court, I have to just make those three points. That
5 condition is virtually impossible to meet through no fault.
6 Secondly, there are other -- two other deadlines out there
7 that we're mindful of for getting the economic benefit. Your
8 Honor, I'm talking about when the discount of 75 percent
9 increases to 77, so we think a month is too long if you're
10 even considering this motion. And, thirdly, your Honor, as
11 I've apprised you, we're going to be somewhat in a bind with
12 financing on the schedule, so a short adjournment would not
13 injure the city terribly, but obviously, your Honor, we will
14 be prepared to go forward on September 9th, if that's your
15 Honor's ruling, on the motion for continuance. Thank you.

16 THE COURT: Ms. Ball or Mr. Hackney, what are your
17 appearance obligations in relation to mediation?

18 MR. PEREZ: Thursday, your Honor, is the mediation
19 with respect to the swaps, and then on the 17th is the
20 overall mediation. And I would imagine that there would be
21 other dates set as soon as we have those dates.

22 MS. BALL: And, your Honor, the retirees' committee
23 has asked to participate in the assumption, and they have to
24 get up to speed.

25 THE COURT: Right.

1 MR. PLECHA: If I may, your Honor, Ryan Plecha on
2 behalf of the Retiree Association Parties. It is my
3 knowledge that counsel for the committee has been selected,
4 but it has not yet been formally retained. But it does wish
5 to participate relative to the motion on the lease, so I did
6 just want to make that clear for the Court.

7 THE COURT: Thank you.

8 MR. PLECHA: Thank you.

9 THE COURT: What is your report, sir?

10 MR. SHUMAKER: Your Honor, I'm sorry. As luck would
11 have it, we called his office, his cell, and e-mailed him and
12 haven't heard anything yet. Perhaps by the time we adjourn,
13 I'll know if I can keep looking at my Blackberry. I'm sorry.

14 THE COURT: One more second, please. What would be
15 the consequences to the city that would concern it if the
16 matter were adjourned to Monday and Tuesday, the 23rd and
17 24th?

18 MR. SHUMAKER: I'm sorry, your Honor. I was reading
19 the e-mail that says that the witness would be available on
20 Wednesday if that's -- I'm sorry -- moving the assumption
21 motion --

22 THE COURT: 23rd and 24th.

23 MS. BALL: Your Honor, noting our objection to any
24 adjournment to be in compliance with our best efforts, we do
25 not believe that it will adversely affect any other provision

1 of the agreement.

2 THE COURT: Mr. Hackney.

3 MR. HACKNEY: Your Honor, I think that that would be
4 helpful, and I would have one additional suggestion, which is
5 that I think that the way we should use this adjournment is
6 to, in addition to creating order on the litigation side, to
7 create a little bit of space to see what happens with the
8 mediation. That would be the purpose, in my mind. I would
9 recommend then that -- I would recommend allowing depositions
10 to complete at a time that's closer to the hearing so that we
11 all don't remain in the same litigation scrum that we're
12 currently in and have to --

13 THE COURT: What would you suggest, sir?

14 MR. HACKNEY: And the 23rd, your Honor -- I'm sorry.
15 I don't have my --

16 THE COURT: 23rd is a Monday, Monday and Tuesday,
17 the 23rd and 24th.

18 MR. HACKNEY: You know what? In bankruptcy
19 litigation a lot of times the depositions will run up a
20 little bit closer to the hearings, and I would say that I
21 would do it -- I would cut it off on the Wednesday before.

22 THE COURT: That would be the 19th?

23 MR. HACKNEY: Yes, sir.

24 THE COURT: Any objection to that, Mr. Shumaker?

25 MR. SHUMAKER: Your Honor, we have the eligibility

1 track going on, and the nonexpert depositions are to be
2 completed on the 23rd for that. The witnesses are also here
3 and available tomorrow and Friday. We would propose --

4 THE COURT: Oh, I think you should go ahead with
5 those regardless.

6 MR. SHUMAKER: And I think --

7 THE COURT: They're scheduled.

8 MR. SHUMAKER: I think that's --

9 THE COURT: And with a third of the city's witnesses
10 next Wednesday.

11 MR. SHUMAKER: Yes. I think subject to what Ms.
12 Ball has already said, then that would be fine with the city.

13 THE COURT: I'm sorry if I misunderstood you, Mr.
14 Hackney. I thought you were talking about extending the
15 opportunity for rebuttal witnesses' depositions through the
16 19th.

17 MR. HACKNEY: That's correct.

18 THE COURT: All right. Sorry. Let's stick with the
19 schedule you have for the city's witnesses' depositions.
20 Okay. All right. Subject to the availability of a courtroom
21 here in this building, we will reschedule the hearing on the
22 assumption motion for the 23rd and the 24th. The Court will
23 allow the city four hours and the objecting parties five
24 hours, and I want you to work with your best efforts to come
25 up with a joint statement on how the swaps and COP's work.

1 MR. SHUMAKER: We will do that, your Honor.

2 THE COURT: Yes. Okay. Let's turn our attention
3 then to the city's motion for a protective order regarding
4 the data room.

5 MR. SHUMAKER: Your Honor, you recall our colloquy
6 last week about the data room, and consistent with my
7 representation to you, the city filed the motion for
8 protective order. I don't believe that there are any
9 objections to it. It has to do with the access to the data
10 room. Two of the things that have occurred, as reflected in
11 the motion, are we have removed any requirement that the
12 objectors or others with discovery rights sign an NDA, and we
13 have also gone back to the city's pension actuary, Milliman,
14 and essentially renegotiated that contract such that they no
15 longer will require an NDA to access their materials. The
16 only outstanding issue was, just for clarity purposes, that
17 the city would still be able to redact personally
18 identifiable information. There's very few documents -- I
19 mean I think less than a handful -- that have Social Security
20 numbers, home addresses, and even the city's own bank account
21 number, but that's what the city seeks to do with this
22 motion.

23 THE COURT: Anyone object to the city's redaction of
24 personally -- of personal information? There was an
25 objection or a request really, more appropriately stated,

1 that the city waive any NDA obligations of people who have
2 already signed them and waive any releases that people
3 entered into as a condition previously of entering into this
4 room.

5 MR. SHUMAKER: We'll, of course, do that, your
6 Honor.

7 THE COURT: You will. All right. One of the papers
8 actually had proposed language, I think, to be added to the
9 order that you seek. Did you see that language?

10 MR. SHUMAKER: I know that came in last night.
11 Thank you.

12 THE COURT: Well, we don't have to review it now.
13 Let me just ask you to work with --

14 MR. SHUMAKER: Certainly.

15 THE COURT: -- whoever filed that to see if you can
16 agree upon the language and to submit an amended order
17 through our order processing program.

18 MR. SHUMAKER: We will do that, your Honor.

19 THE COURT: Ms. Calton, did you want to be heard?

20 MS. CALTON: Yes, your Honor. Judy Calton for
21 Detroit Entertainment, LLC, which is Motor City Casino. At
22 present the casino has to file financial information
23 regularly with the city under the Michigan Gaming Control
24 Act, and under the Act that information is confidential, and
25 it can't be subject of a Freedom of Information Act

1 disclosure. As far as I can tell, that information today is
2 not in the data room. My client is concerned that its right
3 for that information to be confidential maintains
4 confidential or at least if they're going to feel that they
5 should make it public that we have an opportunity for advance
6 knowledge and to seek a protective order. And I feel kind
7 of -- it's not a today issue, but we need to be protected in
8 case tomorrow they decide to put it in there.

9 THE COURT: Any thoughts on this?

10 MR. SHUMAKER: Your Honor, we have no intention of
11 putting the financial statements that Ms. Calton talks about
12 in there. If for some reason that would change, we would
13 endeavor to talk to counsel about that.

14 THE COURT: That representation sufficient for you?

15 MS. CALTON: Yes. Thank you.

16 THE COURT: All right. The motion is granted with
17 the condition that the city seeks and the additional
18 condition that we've discussed here. Please submit an order.
19 Would anyone else like to raise anything else here today?
20 All right.

21 MR. SHUMAKER: Your Honor, if I may, one --

22 THE COURT: Sir.

23 MR. SHUMAKER: I'm sorry. One issue that has arisen
24 with the depositions -- and I don't have any firsthand
25 knowledge of this, and I tread lightly given our exchange

1 last week, but apparently there has been some media inquiries
2 about attending the depositions of Mr. Buckfire and Mr. Orr.
3 I raise that because we want to avoid tomorrow or Friday some
4 sort of situation where people are trying to get into the
5 deposition room, the witnesses are prejudiced by, you know,
6 the commotion, and we're just -- we're seeking whether --
7 wondering if we could get some clarification from your Honor
8 as to the fact that hopefully --

9 THE COURT: What's your position on whether it
10 should be allowed or not?

11 MR. SHUMAKER: Well, the witnesses will be present
12 on September 9th for the hearing, so obviously they will be
13 present then. If your Honor wants us to provide a transcript
14 from the deposition to the press, we could do that if need
15 be, but I really am worried about crowd control, if you will,
16 tomorrow where the deposition is going to take place.

17 THE COURT: Mr. Hackney.

18 MR. HACKNEY: I do share Mr. Shumaker's concerns
19 just on the subject of crowd control. I had a suggestion for
20 your Honor, which is -- I'm not entirely certain, I'll
21 confess, about whether parties in interest in the case
22 generally that haven't objected to the motion are entitled to
23 appear at a deposition and ask questions. I'll just tell you
24 that I just don't know the answer to that. From an orderly
25 process --

1 THE COURT: The answer is no.

2 MR. HACKNEY: Okay. That's helpful because my
3 suggestion was that the only people that be allowed to appear
4 in person at the deposition would be parties that have
5 objected and that perhaps could --

6 THE COURT: I agree with that.

7 MR. HACKNEY: -- communicate with me and Mr.
8 Shumaker who they will be maybe I'll just say.

9 THE COURT: Um-hmm.

10 MR. HACKNEY: That will allow us to exercise some
11 crowd control over the physical room we're taking the
12 deposition in.

13 THE COURT: Um-hmm.

14 MR. HACKNEY: We have a conference call line that
15 we're going to set up for people that want to listen in, and
16 so that was requested by certain people that couldn't be in
17 Detroit, and separately --

18 THE COURT: Certain attorneys representing parties
19 who have filed objections?

20 MR. HACKNEY: Yes, for sure. Like I said, I didn't
21 know coming to the podium today how parties in interest were
22 handled in terms of their ability to even attend. And the
23 idea of giving a transcript after the deposition would seem
24 to address some of the public interest concerns that the
25 people of the city legitimately have --

1 THE COURT: Um-hmm.

2 MR. HACKNEY: -- you know, so that would be our
3 suggestion.

4 THE COURT: Um-hmm. Would anyone else like to be
5 heard regarding this specific issue?

6 MR. PLECHA: Good morning, your Honor. Ryan Plecha
7 again on behalf of the Retiree Association Parties. Because
8 of the new nature of the retiree committee, I would request
9 that they be allowed to attend even though they've not had
10 the opportunity to file a formal objection at this point.

11 THE COURT: Um-hmm. Interesting point. Anybody
12 object to that?

13 MR. HACKNEY: No, your Honor.

14 THE COURT: The Court will permit that then. All
15 right. I do think it is appropriate to order that only
16 parties plus a representative of the retiree committee to
17 attend these depositions. The Court will order the release
18 of the transcript of the depositions to the press upon their
19 request but that no other members -- no other parties in the
20 case or no members of the press otherwise be permitted to
21 attend these depositions. Anything further yet? Thank you
22 for bringing that up. All right. We'll be in recess then.

23 THE CLERK: All rise.

24 MR. HACKNEY: Thank you, your Honor.

25 THE CLERK: Court is adjourned.

1 (Proceedings concluded at 11:01 a.m.)

2 * * *

INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript
from the sound recording of the proceedings in the above-
entitled matter.

/s/ Lois Garrett

August 30, 2013

Lois Garrett

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846
MICHIGAN, .
 . Detroit, Michigan
 . November 14, 2013
Debtor. . 2:36 p.m.

HEARING RE. MOTION OF THE OBJECTORS FOR LEAVE TO
CONDUCT LIMITED DISCOVERY IN CONNECTION WITH MOTION OF
THE DEBTOR FOR A FINAL ORDER PURSUANT TO 11 U.S.C.
SEC. 105, 362, 364(c)(1), 364(c)(2), 364(e), 364(f),
503, 507(a)(2), 904, 921 and 922 (I) APPROVING POST-
PETITION FINANCING, (II) GRANTING LIENS AND PROVIDING
SUPERPRIORITY CLAIM STATUS AND (III) MODIFYING
AUTOMATIC STAY
BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Jones Day
By: BRAD B. ERENS
77 West Wacker
Chicago, IL 60601-1692
(312) 782-3939

Jones Day
By: ROBERT W. HAMILTON
325 John H McConnell Blvd., Suite 600
Columbus, OH 43215
(614) 469-3939

For Detroit Retirement
Systems - General Retirement System
of Detroit, Police and Fire Retirement
System of the City of Detroit: Clark Hill, PLC
By: ROBERT D. GORDON
151 South Old Woodward, Suite 200
Birmingham, MI 48009
(248) 988-5882

For National Public Finance
Guarantee Corporation: Sidley Austin, LLP
By: GUY S. NEAL
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8041

APPEARANCES (continued):

For Syncora Holdings, Ltd.,
 Syncora Guarantee, Inc., and Syncora
 Capital Assurance, Inc.:
 Kirkland & Ellis, LLP
 By: STEPHEN HACKNEY
 300 North LaSalle
 Chicago, IL 60654
 (312) 862-2074

For Ambac Assurance Corporation:
 Arent Fox, LLP
 By: CAROL CONNOR COHEN
 1717 K Street, N.W.
 Washington, DC 20036
 (202) 857-6054

Court Recorder: Letrice Calloway
 United States Bankruptcy Court
 211 West Fort Street
 21st Floor
 Detroit, MI 48226-3211
 (313) 234-0068

Transcribed By: Lois Garrett
 1290 West Barnes Road
 Leslie, MI 49251
 (517) 676-5092

Proceedings recorded by electronic sound recording,
 transcript produced by transcription service.

1 THE COURT: And let's move on and talk about
2 discovery.

3 MR. HACKNEY: Good afternoon, your Honor. Stephen
4 Hackney on behalf of Syncora.

5 THE COURT: Yes, sir.

6 MR. HACKNEY: Your Honor, we're here on a motion
7 that Syncora filed with several other parties joining that
8 relates to discovery that we'd like to take in anticipation
9 of the hearing on the motion for post-petition financing that
10 you spent most of the morning and afternoon discussing.
11 Before I -- I know that we're running into your next call,
12 and I will get right into the discovery itself, but I was
13 wondering if I could --

14 THE COURT: Well, don't worry about that. Don't
15 feel rushed. I want to --

16 MR. HACKNEY: Okay. I will try.

17 THE COURT: I want to take our time and do this
18 properly.

19 MR. HACKNEY: I wanted to at the start, if I could,
20 your Honor, frame the importance of the DIP motion itself to
21 the case because I think its importance is significant not
22 only to this case but to other Chapter 9's that may follow,
23 and I think it's important to think about that in the context
24 of why we believe discovery is important. As you've heard
25 today, the proposed DIP loan in question is believed to be

1 the first of its kind. We actually -- our research indicates
2 that it's not literally the first Chapter 9 DIP loan. Our
3 research indicates that there have been a couple small DIP
4 loans in other Chapter 9's, and there was a sizeable one that
5 was done as part of a plan, but it is the first of its kind
6 in terms of being the largest and also one I think that is
7 unabashedly about revitalization of the city in part as
8 opposed to immediate cash flow needs, so the DIP loan in this
9 case that's being proposed is significant.

10 It is significant for a second reason, and that is
11 because the proceeds of the DIP loan, the \$350 million, 230
12 million about will be used to pay certain creditors outside
13 of the plan context, and the \$120 million that's going to be
14 devoted to what are called quality of life initiatives, the
15 idea of a revitalization of the City of Detroit, a
16 renaissance on the street, so to speak, is also one that will
17 be happening outside the plan context, so they're coming to
18 you on an interim basis between eligibility and confirmation
19 and saying that they would like to be able to do this today.

20 The reason this is of great sensitivity and concern
21 to creditors is because if the city pledges away income
22 streams or assigns them to different parties now, it has
23 obviously an important impact on the city's ability to later
24 fairly adjust the debts of creditors like Syncora or the
25 pensioners or the others, so we perceive there to be

1 significant plan implications by some of these interim
2 motions that are being brought to the Court, and that is why
3 this is an area of great focus and concern for creditors, and
4 that informs somewhat the discovery that we've sought.

5 I believe there is some agreement with the city that
6 some discovery is appropriate, and I'd like to recite that
7 for the record and try and narrow it. The city, as I
8 understand it, is amenable to the idea that the objectors can
9 obtain discovery into the DIP solicitation process, the DIP
10 evaluation process, and the process by which the DIP was
11 submitted to the City Council under PA 436. It's my
12 understanding, at least, that we have general agreement that
13 that's okay and also that the city is willing for its
14 deponents, Mr. Doak and Mr. Moore, to be deposed.

15 Where there is disagreement with respect to the
16 scope of potential document requests and inquiry is on the
17 subject of the uses and the need for the quality of life
18 proceeds, and this is where I will confess I was taken a
19 little aback by our disagreement on this because the motion
20 itself is replete with references to Mr. Moore's declaration
21 but also to a discussion of all of the challenges that the
22 City of Detroit faces, for example, with respect to blight
23 remediation, the fire department, the police department, and
24 IT infrastructure. These are some of the areas where the
25 city has said it may -- it's not obligating itself to, but it

1 has said it may or that it intends to direct the quality of
2 life proceeds at these subject matter areas. We believe that
3 discovery into --

4 THE COURT: Excuse me. Why does Syncora care about
5 what the city's priorities are in terms of quality of life
6 spending?

7 MR. HACKNEY: The answer, your Honor, is because, as
8 a creditor who, you know, expects to see a plan of adjustment
9 at the end of the case that fairly allocates or fairly
10 adjusts its debts along with the debts of the others in the
11 case, the way the city spends its money and the impact or
12 lack of impact that has on creditor recoveries Syncora
13 believes is endemic to analyzing whether it is, for example,
14 within the business judgment, as the city has contended it is
15 and which is one of the elements under Section 364 or one of
16 the factors you'll consider, whether it's in the best
17 interest of creditors, as they have suggested that it is in
18 their papers and as the order they proposed would find, and
19 it also goes to whether --

20 THE COURT: Do you think the city is going to ask me
21 to approve its allocation of how it's going to spend the
22 proceeds of the loan?

23 MR. HACKNEY: I think that --

24 THE COURT: That makes me sound like a mayor or a
25 city council.

1 MR. HACKNEY: Well, these -- your questions go right
2 to the core, I think, of this matter, but also in some
3 respects of the case, and I was -- let me respond in two
4 respects, your Honor.

5 THE COURT: Well, we don't have to have an answer
6 now, but the issue is why have discovery on all of this?

7 MR. HACKNEY: Yeah. So I will answer your question,
8 which is I know that the city -- or I believe that the city
9 is taking the position that you're not permitted to consider
10 either the needs or the uses of the funds and that they have
11 sovereignty to administer themselves sort of thematically
12 under Section 904.

13 THE COURT: Is that a proposition you disagree with?

14 MR. HACKNEY: It is. It is because, your Honor, I
15 acknowledge that under Section 904 that the city has the
16 right to administer itself without the Bankruptcy Court
17 interfering. That's the language of Section 904. But where
18 things change substantially is when you come to this Court
19 and ask this Court to begin to work the controls of the
20 Bankruptcy Code to the benefit of the city when they invoke
21 concepts like obtaining superpriority liens or good faith
22 assurances to be given to parties so that they're protected
23 no matter the outcome of various appeals and so on and so
24 forth. When you come into that context, we believe you've
25 now entered -- first of all, you've put your dispute --

1 you've consented to the idea that the Bankruptcy Court must
2 determine whether it's appropriate, and we believe that
3 unlike a mayor or another political leader who thinks about
4 the needs of his citizens or her citizens in administering
5 the body politic, a bankruptcy judge, under Chapter 9 and the
6 history behind Chapter 9, the legislative purpose, does think
7 in terms of fairness to creditors, that that is an essential
8 aspect of the purpose of Chapter 9, and that the bankruptcy
9 judge is duty bound to consider --

10 THE COURT: The fairness of what, though?

11 MR. HACKNEY: What's that?

12 THE COURT: The fairness of what?

13 MR. HACKNEY: The fairness of the proposed action in
14 terms of how it will impact creditors. For example, we
15 believe, your Honor, if I could go back to answer your
16 question about will you have to involve yourself in assessing
17 how they propose to use the money and whether they're using
18 it in the right way, we think that, at a minimum, we should
19 be entitled to take discovery on the subject but also that
20 you should consider evidence later that there are less
21 burdensome ways, for example, for the city to improve the
22 quality of life in Detroit that may not impair creditor
23 recoveries or that may not require superpriority liens and
24 the like, that there are different ways that the money can be
25 spent so that creditors will obtain either a better return on

1 their -- a better return on their claims. And, for example,
2 your Honor, this is particularly appropriate when you think
3 about the concept of Section 364 and its incorporation into
4 Chapter 9, which hasn't always been part of Chapter 9, but
5 when it was incorporated, there's some of the legislative
6 history that suggests that the reason it was a good idea to
7 incorporate it into Chapter 9 was similar to the reason that
8 it is a good idea in Chapter 11, which is that post-petition
9 financing can be used to enhance the value of the estate and
10 enhance the value to creditors. So we believe that the
11 question of how the money is being spent is germane to the
12 question of whether or not it's serving the purposes of
13 Section 364 even in the Chapter 9 context.

14 And your Court is asking -- the Court is asking
15 questions that I think are momentous ones. I think the --
16 formulating the appropriate legal standard by which the Court
17 can determine that the interests of creditors are being
18 safeguarded whenever a municipal debtor invokes the
19 provisions of Chapter 9 that are outside Section 904 I think
20 is going to be critical and precedent setting, not only in
21 this case but also in the other cases, and I think that it is
22 inconsistent for the city, I guess, in my mind, your Honor,
23 to say that this evidence isn't relevant or that you're not
24 permitted to consider it when it dominates their motion and
25 where they are asserting that they have exercised good

1 business judgment and that what they're going to do is in the
2 best interest of creditors and is necessary to enhance the
3 value of the estate and so forth, the other elements that
4 you'll consider under Section 364. That is why we want to
5 obtain that discovery, and we want to test the proposition
6 that the city is advancing that this is a good way to spend
7 the money and, by the way, so important that it has to be
8 done now outside of the plan context at a time where the city
9 doesn't have some sort of cash flow emergency. It's my
10 understanding that the city's cash coffers have actually
11 increased substantially during the bankruptcy in part because
12 it isn't -- it is not paying bond debt such as the debt held
13 by my client in part, so this isn't a situation where the
14 city is coming to you and saying we need \$5 million to get us
15 through the case or to pay professionals or to literally pay
16 the police officers. The city has more cash today than it
17 did when it started the cases. It is about a novel and
18 distinct concept, in our view, novel in the history of
19 Chapter 9, which is that during the pendency of the case, you
20 can use the Bankruptcy Code to revitalize the city and to
21 allow for a renaissance, which is the word from the
22 declaration and from the motion. And whether you can do that
23 outside the plan context and whether you can actually
24 subordinate creditor recoveries to the notion of
25 revitalization is, we believe, a threshold issue of critical

1 importance to the cases, and that's why we are urging the
2 Court to allow us to take discovery, to allow for a fully
3 developed record before you for whatever decision that you'll
4 make on this subject when we try it.

5 THE COURT: What does this discovery entail
6 specifically?

7 MR. HACKNEY: What I would think it would entail
8 is -- I understand that we haven't proffered requests yet,
9 but I've already mentioned to counsel for the city that I
10 understand we'll have to put some thought into formulating it
11 because we don't want every piece of paper that relates to
12 the fire department or the police department or to blight,
13 and it's likely burdensome for the city to go collect all of
14 that information. What I was thinking that we would want
15 were two principal types of information. The first type of
16 information would be information that relates to assessments
17 of how the City of Detroit can improve itself. There have
18 been consultants obviously in this case who have been doing
19 this type of work. There have also been other consultants,
20 it's my understanding, in the history of the City of Detroit
21 who have looked at some of these questions, and the types of
22 documents or reports, whether it's from a consultant or
23 whether it's something internal at the Detroit
24 Fire Department itself that says here are our needs, here are
25 the most important things to us that would most allow us to

1 achieve our mission, here's the anticipated costs, those
2 types of analytical documents I think would be of extreme
3 importance to creditors so that they can make an assessment
4 of whether or not the city is exercising its judgment in a
5 way that's most appropriate or that is most efficient, and
6 the second type of document that I could see would be
7 documents that Mr. Orr himself considered as the decider
8 behind the loan as he's looking out at the city he's
9 administering and trying to decide how much money do I need
10 and what pacing and where will I put it and why, documents
11 that he considered that show how he selected the priorities
12 that he selected and documents that show what perceived
13 impact his decisions will have on the creditors in terms of
14 their recoveries to the extent these documents exist. Those
15 are the types of documents I was thinking of when we broadly
16 described the concept of discovery into the uses and needs of
17 the quality of life note.

18 A third category of documents would be additional
19 specificity around the deployment of the capital in terms of
20 how it will be spent, the specific uses.

21 There are also some depositions that we had proposed
22 in addition to the two affiants, and the city, I think, is of
23 the view that it may object to some of those depositions.
24 There were four that we had put forward, a Barclays
25 deposition that relates to the negotiation of the DIP itself;

1 depositions of City Council members that would be germane to
2 discovery of the compliance with PA 436; discovery of an
3 Ernst & Young representative, which is germane to the cash
4 flow forecasts that have been assembled and what they say
5 about the city's cash flow needs; and, last, depositions of
6 the swap counterparties. And I want to make clear for the
7 Court in proposing the concept that we would depose the swap
8 counterparties, it wasn't my intention that we would revisit
9 the forbearance agreement discovery that was done previously.
10 It was my intention that we would examine them on the subject
11 of whether they're going to close on the optional termination
12 payment under a variety of circumstances because you wouldn't
13 want the city to take down \$350 million in credit if it was
14 not going to be able to deploy the money in the way that it
15 was saying and pay the interest costs and so forth and not
16 being able to close. The city has suggested that they oppose
17 the swap counterparty depositions and that they, I think,
18 needed additional information on the Ernst & Young purpose.

19 But those were the categories, and those were the
20 depositions that we propose to take, and I wanted to make
21 sure that I contextualize that within what's at stake here in
22 the motion itself. Thank you.

23 THE COURT: I'd like to hear from the city, please.

24 MR. HAMILTON: Good afternoon, your Honor. Robert
25 Hamilton of Jones Day on behalf of the City of Detroit. When

1 we received on October 23rd Syncora's motion for authority to
2 take discovery under Rule 2004, while we thought the
3 procedure was incorrect, we understood that discovery was
4 inevitable and going to occur with respect to our at that
5 time anticipated motion to obtain approval for the post-
6 petition financing from Barclays, and we immediately began
7 the process of collecting and reviewing documents for
8 eventual production to Barclays -- I mean to Syncora and
9 others who may decide to object to our motion for approval of
10 the financing facility.

11 We have collected and reviewed documents with
12 respect to how much financing -- external financing the city
13 will need to fund the assumption of the forbearance agreement
14 if this Court were to approve that assumption in a separate
15 hearing as well as how much external financing would be
16 needed to start the funding of the restructuring initiatives
17 that were the subject of the July 14th proposal to creditors
18 and that was the subject of extensive testimony during the
19 eligibility trial that your Honor oversaw over the last few
20 weeks.

21 We've also collected documents regarding the
22 solicitation process for potential participants in the post-
23 petition financing facilities as well as the myriad of
24 proposals that we received from various potential lenders and
25 their terms and documents regarding the exercise of the

1 city's business judgment in selecting the Barclays proposal
2 as the best one for the city. As a result of that process,
3 we have collected and are prepared to produce tomorrow or
4 Monday over 5,000 pages of documents on each one of those
5 topics to those parties who indicate that they want to take
6 that discovery and, with respect to some of the documents,
7 agree to a protective -- or a confidentiality agreement to
8 maintain the confidentiality of some of the documents that
9 we're submitting.

10 We have also offered to Syncora to make our
11 witnesses, our two declarants, available for deposition, Mr.
12 Doak, who you heard from today, on Friday, November 22nd, in
13 New York, and on Monday, November 25th, Mr. Moore in Detroit.
14 The city consents to the discovery that I've just outlined
15 the production of all these documents on the need for
16 external financing, the process for obtaining that financing,
17 and the selection of Barclays. We consent to the deposition
18 of those two declarants.

19 Syncora is asking for leave to take discovery on
20 other subjects that go substantially beyond the scope of what
21 we consented to, we believe on subjects that threaten to
22 impose substantial economic and logistical burdens on the
23 city on topics that we believe are not what this Court must
24 adjudicate when it hears and determines our motion for
25 approval of the post-petition financing motion. Those

1 categories where they're going beyond what we think is the
2 legitimate scope fall under -- or there's two categories.
3 The first is relatively simple to deal with, and that's the
4 category with respect to our proposal -- or our request that
5 the Court approve our motion to assume the forbearance
6 agreement. With respect to the motion that Syncora filed for
7 leave to take discovery, they did not list that as one of the
8 topics on which they were seeking documents, but they did
9 identify they wanted to take depositions of the swap
10 counterparties. I did not follow entirely what counsel's
11 explanation was for why the depositions of the swap
12 counterparties is not a back door effort to take additional
13 discovery on the forbearance agreement, but I would just
14 suggest that if this Court at a separate hearing determines
15 to approve the city's assumption of the forbearance
16 agreement, the city, as -- pursuant to the terms of that
17 forbearance agreement that are detailed in our motion and in
18 the motion to assume the forbearance agreement, the city
19 would have the option to then cause the termination events
20 that would trigger our obligation to pay the \$230 million --
21 \$230 million -- 210 -- \$210 million pursuant to that
22 forbearance agreement, so there would be, as we can see it,
23 no reason to depose in connection with the finance motion the
24 swap counterparties because the finance motion only becomes
25 material if you approve the forbearance agreement. And if

1 you approve the -- if you approve the forbearance agreement,
2 what the swap counterparties say about what their intentions
3 are are immaterial and irrelevant because at that point the
4 city controls what happens upon seven or ten days' notice
5 under the forbearance agreement.

6 The bottom line is this Court has already heard and
7 considered and decided what discovery should occur in
8 connection with our motion to assume the forbearance
9 agreement. That discovery has occurred, and the hearing is
10 scheduled to occur, and it should -- it will be decided based
11 on the record that this Court already dictated should be
12 developed for that hearing, and Syncora or others should not
13 be allowed to pursue discovery on the finance motion as a way
14 to get back door discovery and supplement the record on the
15 motion to assume the forbearance agreement.

16 The more difficult argument and the more difficult
17 category is what counsel spent most of his time in his
18 argument on, and that is the request for discovery on our
19 proposed use of the quality of life -- the proceeds of the
20 quality of life bonds. The devil in this request is
21 substantial. While he indicates that they want to take just
22 limited document discovery, just assessments that the city
23 may have developed both at the macro level and at individual
24 department levels, the fire department, the police
25 department, and how much money they think they need for what

1 particular improvements, documents that Mr. Orr may have
2 considered in deciding what restructuring initiatives to
3 approve and which ones to table, and how the money will be
4 spent among various different departments, I can't think of
5 what kind of evidentiary hearing counsel is contemplating
6 that that discovery would go to other than sort of a super-
7 tribunal in which this Court second-guesses and sits in
8 judgments of every single governmental decision that the City
9 of Detroit is making on how to go forward with its
10 revitalization and restructuring initiatives. There is no
11 way that kind of hearing could be completed in one or two
12 days.

13 Essentially, I think what counsel is suggesting is
14 that Section 364 constitutes an effective repeal of Section
15 904 in a Chapter 9 case where the Bankruptcy Court does not
16 have authority or jurisdiction to interfere with a
17 municipality's governmental decisionmaking and its decisions
18 on how to use its property and revenue unless the
19 municipality decides they have to borrow some money, and if
20 the municipality decides it has to borrow some money, then
21 the Bankruptcy Court, notwithstanding 904, can sit in
22 ultimate judgment and second-guess every single spending
23 decision that the city makes on how much money to spend on
24 fire, how much money to spend on police, how much money to
25 spend on lighting, how much spending -- money to spend on

1 roads, versus creditor recoveries. And, in essence, they
2 would turn the 364 --

3 THE COURT: Don't forget pensions.

4 MR. HAMILTON: Very important, pensions, maybe not
5 sacrosanct, but very important. And the point would be that
6 instead of the Chapter 9 plan of adjustment process working
7 those things out, they want to turn the 364 hearing into some
8 macro hearing that decides how all the money that the City of
9 Detroit should spend for the next ten years, how it should be
10 spent, what dollars should go to creditor recoveries, what
11 dollars should go to fire improvement, what dollars should go
12 to police improvement, all because we have to borrow some
13 money in order to fund some of these initiatives. We do not
14 think that is a proper construction of either 904 or 364. We
15 believe that when you hear the 364 motion, we have to
16 demonstrate that we exercise sound business judgment in
17 determining that we needed to borrow money in order to meet
18 our cash needs. We will also have to demonstrate that we --
19 in order to borrow that money under 364(c)(2), we had to give
20 super administrative priority status and liens because
21 general unsecured credit was not available. That does not
22 mean that this Court will sit in review of the city's
23 business judgment on the underlying money that is needed.
24 You do sit in judgment on whether or not forbearance
25 agreements should be approved, but that's on a separate

1 motion under 365 and a 9019 motion. And if you decide that
2 that forbearance agreement should be approved, then we know
3 we need \$210 million. Then, in connection with the 364
4 motion, you will hear and adjudicate our business judgment as
5 to whether or not we needed to borrow the money to pay that
6 \$210 million and whether or not the terms on which we want to
7 borrow that money are reasonable and in everybody's best
8 interest. That is your call.

9 Similarly, by the same token, with respect to the
10 restructuring initiatives, the city has exercised its
11 governmental and political judgment as to how much money it
12 should invest in its restructuring initiatives over the next
13 ten years. You do not sit in judgment and review the city's
14 exercise of its governmental and political decision-making in
15 that regard. That's up to the city to figure out how to do
16 with the mayor, with the emergency manager, and with all the
17 constituents. We have already presented an extensive
18 evidentiary record on how those calculations were made, what
19 the restructuring initiatives are, and how much they will
20 cost over the next ten years. And we lay that out in our
21 motion just like we lay out all the details of the
22 forbearance agreement, but in connection to whether or not
23 you're going to approve the financing arrangement, what you
24 sit in judgment on is not our decision to spend \$1.25 billion
25 over the next ten years on those restructuring initiatives

1 because that's a governmental political decision that only
2 the City of Detroit has the authority to make. What you sit
3 in judgment on is our business judgment that we need to
4 borrow some money to start paying for those initiatives and
5 the terms on which we want to borrow that money are
6 reasonable. That's what you sit in judgment on, and we are
7 going to produce the documents that are relevant to that
8 inquiry, but it is not appropriate to turn the 364(c) hearing
9 into some mega trial that kind of makes moot the whole plan
10 of adjustment in which the parties ask you to decide what's
11 an appropriate use of loan proceeds and what's not. Should
12 we use the loan proceeds to pay creditor recoveries, or
13 should we use it to pay pensions, should we pay it to use --
14 to pay for OPEB, or should we use it to pay for lighting?
15 That's not what this hearing is about, and I think it's
16 improper for them to try and seek discovery on that.

17 We are willing to make Mr. Moore and E&Y available
18 for deposition on the fact that we need to borrow money to
19 start paying -- to start funding the initiatives, the
20 restructuring initiatives, but we think it is improper for
21 them to take discovery on the underlying decision-making, the
22 political and governmental decision-making that the City of
23 Detroit has undertaken in deciding what restructuring
24 initiatives they're going to undertake and when over the next
25 ten years and how much they're going to cost. That's not

1 appropriate for this motion.

2 THE COURT: Thank you, sir.

3 MS. CONNOR COHEN: Your Honor, may I also be heard
4 in support of the motion?

5 THE COURT: Yes, ma'am.

6 MS. CONNOR COHEN: Carol Connor Cohen, your Honor,
7 on behalf of Ambac Assurance Corporation. Your Honor --

8 THE COURT: But not to repeat anything.

9 MS. CONNOR COHEN: I'm sorry.

10 THE COURT: But not to repeat anything.

11 MS. CONNOR COHEN: I will not repeat anything. I
12 want to start with, though, talking about what the test is
13 under 364 because quite clearly the city has moved to have
14 your Honor make a ruling under 364(c) in this bond financing.
15 The Court will have to look at whether the debtors exercise
16 reasonable business judgment, whether --

17 THE COURT: On what?

18 MS. CONNOR COHEN: On -- I'm going to -- would you
19 just let me finish, and I'll get back to that? I want to
20 come back to that.

21 THE COURT: You're asking me not to ask you any
22 questions?

23 MS. CONNOR COHEN: No.

24 THE COURT: I didn't think so.

25 MS. CONNOR COHEN: No, but actually there's a point

1 I want to make --

2 THE COURT: Okay.

3 MS. CONNOR COHEN: -- here that --

4 THE COURT: I'll let you work into it. That's fine.

5 MS. CONNOR COHEN: -- the Court has to exercise
6 reasonable business judgment, has to evaluate whether it's in
7 the best interest of creditors and the estate, has to look at
8 alternative financing that might have been available, whether
9 there are any better bids and all that kind of stuff -- we've
10 talked about that -- whether it's necessary, essential, and
11 appropriate to preserve the estate and continue operations,
12 whether the terms are fair, reasonable, and adequate, whether
13 it was negotiated in good faith and at arm's length. Now,
14 some of those criteria are the same as in a Chapter 11, and
15 some of those criteria the debtor has said they're happy to
16 give us discovery on. But there's two or three of these that
17 really have never been applied before on a Chapter 9, and
18 that's exactly my point, the reasonable business judgment and
19 the best interest of creditors and the estate and whether
20 it's necessary, essential, and appropriate to preserve the
21 estate and continue operations. Those have never been
22 applied before in a Chapter 9, and part of what the Court
23 will have to do in deciding the motion before the Court will
24 be to decide what the proper criteria is, in fact. I don't
25 believe that's what we're here for today because there is

1 going to be extensive briefing, I'm sure, on those questions,
2 and, you know, we will --

3 THE COURT: Well, but some judgment about that is
4 necessary to control or decide the dispute about discovery.

5 MS. CONNOR COHEN: Of course it is, and what we will
6 point to in discussing that issue, for example, is the
7 legislative history that was -- when 364 was first
8 incorporated into what was then the version of Chapter 9, and
9 at that time Congress said the reason they were doing it, the
10 reason they were adding this ability in for a municipality
11 was so that the municipality could maintain essential city
12 services directed to public safety and public health during
13 the reorganization proceeding, kind of a narrow purpose
14 because it was very controversial to add this provision into
15 Chapter 9.

16 Now, the question is going to become -- and we
17 don't -- this isn't a question for today again, but the
18 question is going to become at what level is the city
19 permitted to spend at the creditors' expense and still be
20 able to confirm a plan because it is pretty well settled --
21 there's tons of cases out there that when it comes time to
22 confirming a plan of adjustment, that the best interest of
23 creditors test does limit the city's ability to spend lots of
24 money on improving and glossing the current situation as
25 opposed to paying off creditors, that there's a limit to how

1 much money the city can expend at the expense of creditors.
2 We believe that same criteria should apply on the best
3 interest of creditors position here.

4 THE COURT: Fixing the lights in the city is
5 glossing the city?

6 MS. CONNOR COHEN: No. And we're not talking about
7 the Lighting Authority motion right now anyway, but you're
8 right.

9 THE COURT: All right. Fair enough. I'll change
10 the question.

11 MS. CONNOR COHEN: To ask --

12 THE COURT: Getting adequate police and fire is
13 glossing the city?

14 MS. CONNOR COHEN: Having adequate police and fire
15 is not putting a gloss, absolutely not. And the legislative
16 history suggests that's exactly why this provision was added
17 to Chapter 9, but how and whether you're doing it in the most
18 efficient manner or at the expense of repayment of creditors
19 is something that's in this Court's purview under this test.

20 Now, we keep hearing 904, 904, 904. 904 is not an
21 absolute. 904 says quite clearly that the debtor can consent
22 to the Court's involvement, interference, as the statute
23 says. Here the debtor has come to the Court. They could
24 have gone off and spent their money however they wanted.
25 They could have borrowed money if -- and spent it how they

1 wanted, but they came to your Honor and asked for an order,
2 and the reason they're coming to your Honor and asking for an
3 order is because --

4 THE COURT: They came to the Court for an order but
5 only to approve the necessity of the borrowing, the necessity
6 of the priority and the senior liens, and to establish the
7 reasonableness of the terms.

8 MS. CONNOR COHEN: But --

9 THE COURT: What suggests there's any consent beyond
10 that?

11 MS. CONNOR COHEN: Well, once you do that, when they
12 come to your Honor and asked to be able to give Barclays this
13 superpriority treatment and the like, then that has to be
14 considered consent to having the criteria under 364(c) apply,
15 which includes looking at the best interest of creditors and
16 whether they are not --

17 THE COURT: Okay. Can you walk me through the baby
18 steps as to why that follows because I don't exactly see it?

19 MS. CONNOR COHEN: Well, simply coming to the Court
20 in the first instance has in other situations effectively
21 been treated as consent. All right. But they didn't have to
22 come to your Honor.

23 THE COURT: I'm not sure the proponents of Stern
24 versus Marshall would a hundred percent agree with you on
25 that.

1 MS. CONNOR COHEN: Well, I don't -- okay. I'm going
2 to let that one pass, but --

3 THE COURT: Well, no. It's an important point,
4 which is the mere fact that a party comes to court can mean
5 consent to some things, but you have to be very careful in
6 measuring what the consent is.

7 MS. CONNOR COHEN: All right. I'll take that as a
8 given, but what the -- again, what the --

9 THE COURT: Why I'm asking --

10 MS. CONNOR COHEN: What the debtors --

11 THE COURT: Why does this motion constitute consent
12 for this Court to approve, for example, how the city will
13 spend \$350 million?

14 MS. CONNOR COHEN: Because they're asking your Honor
15 to give them -- to give Barclays, this new lender who's going
16 to come in and layer on \$350 million worth of new debt --

17 THE COURT: Um-hmm.

18 MS. CONNOR COHEN: -- over and above most of the
19 other creditors in this case --

20 THE COURT: Um-hmm.

21 MS. CONNOR COHEN: -- they're asking them to have
22 that superpriority status, to become a superpriority creditor
23 of the city, and part of the criteria for deciding whether
24 that's appropriate is to look at the best interest of
25 creditors, a test we believe has to be interpreted the same

1 way as the best interest of creditors test in confirming a
2 plan of adjustment, which, again, looks at a balance of the
3 extent to which the city can spend at the expense of the
4 creditors, so that does require -- now, the litany of
5 horrors we got about the kind of trial, we don't think
6 that's what you were looking at.

7 THE COURT: Is there a 943 case that says that?

8 MS. CONNOR COHEN: I'm not aware of a 943 case, no,
9 but when -- what we're talking --

10 THE COURT: You know what I'm asking. I'm asking in
11 defining best interest of creditors in plan confirmation, is
12 there a case that gives the -- that says the Court has that
13 broad authority?

14 MS. CONNOR COHEN: There actually was case law cited
15 in Syncora's objection to the Public Lighting Authority
16 motion that we joined in that says it's --

17 THE COURT: I should look there?

18 MS. CONNOR COHEN: Those cases say exactly that.

19 THE COURT: All right. I'll look there. Thank you.
20 That's all right. If it's there, you don't need to pull it
21 out again.

22 MS. CONNOR COHEN: Sorry.

23 THE COURT: That's all right.

24 MS. CONNOR COHEN: I don't retain case names.

25 THE COURT: Right.

1 MS. CONNOR COHEN: And I lost what I was saying.

2 THE COURT: Oh, I'm sorry.

3 MS. CONNOR COHEN: No. It's not your fault.

4 THE COURT: Okay. I won't take any then.

5 MS. CONNOR COHEN: Because that is a factor that has
6 to be taken into account at plan time in that text -- in that
7 context, then we think that's something that has to be taken
8 into account also in applying 364 because it also
9 incorporates a best interest of creditors component in the
10 factors, at least according to the case law, and that -- by
11 invoking the Court's jurisdiction to ask for that order, we
12 believe they have consented to having the Court look at the
13 things that have to be looked at.

14 Oh, I know what I was saying. I was saying that the
15 hearing that we're looking for doesn't envision, you know, a
16 lengthy exposition of all of the operational details of all
17 of these various departments and so forth and so on but
18 rather a testimony about what they're going to spend it on,
19 why they need it, why they need those things, and why it has
20 to cost what they think they're asking for, and once your
21 Honor hears the testimony, then you decide does it meet this
22 criteria or not. It's not saying this expenditure is okay
23 and this expenditure isn't.

24 THE COURT: Where in this process do the citizens of
25 Detroit get to be heard?

1 MS. CONNOR COHEN: Well, they will be heard through
2 their various representatives, many of whom are here, the
3 unions, the retiree representatives.

4 THE COURT: There's 680-some thousand citizens. A
5 small percentage of them are represented by unions.

6 MS. CONNOR COHEN: Your Honor, I'm afraid I don't
7 see that --

8 THE COURT: I guess my question is, you know, not to
9 be flip about it, don't the citizens have a right to be heard
10 on the question of how the city will spend the proceeds of
11 this loan if it's approved, and if the answer to that
12 question is yes, isn't the mechanism for providing for that
13 right to be heard the political process, not the judicial
14 process?

15 MS. CONNOR COHEN: Well, it is, and -- it is.

16 THE COURT: Isn't that the end of the discussion?

17 MS. CONNOR COHEN: And that's part of the 436
18 process. I mean the political process is represented in this
19 situation in part by the 436 requirements, the City Council
20 and the Emergency Loan Board, for example, and for the city
21 officials who will be elected -- who have been elected and
22 who will be taking over when Mr. Orr's term is completed, but
23 with --

24 THE COURT: Right, so why -- but doesn't that mean
25 it's a political process, not a judicial process?

1 MS. CONNOR COHEN: Well, it's a judicial process to
2 the extent that your Honor has to apply the standards that
3 are in the statute and in the case law interpreting the
4 statute for providing Barclays with the superpriority status.

5 THE COURT: Suppose the creditors' interests are
6 different from the citizens' interests? What do I do then?

7 MS. CONNOR COHEN: Your Honor applies the statute,
8 the statutory --

9 THE COURT: Creditors win over the --

10 MS. CONNOR COHEN: -- standard, which says that you
11 have to balance -- obviously the -- we don't -- none of us
12 would disagree that the city is entitled to and should spend
13 those amounts necessary to provide essential service to
14 provide public safety and health but doing so in a way and at
15 a cost that is reasonable and that doesn't do so at the
16 expense of the creditors. Thank you, your Honor.

17 THE COURT: All right.

18 MR. HACKNEY: Your Honor, can I reply to Mr.
19 Hamilton?

20 THE COURT: You can, but let me see if there are any
21 other objecting parties --

22 MR. HACKNEY: Absolutely.

23 THE COURT: -- who want to be heard, and then I'll
24 give you a chance. Did you want to be heard, Mr. Gordon?

25 MR. GORDON: Thank you, your Honor. Robert Gordon

1 of Clark Hill on behalf of the Detroit Retirement Systems.
2 Thank you, your Honor. In some respects, your Honor, I feel
3 like I'm still trying to catch up from last week's trial to
4 this issue, and I think it highlights what I'm seeing from
5 over there as a chicken and egg and chicken again issue right
6 now, which is it sounds like we're arguing objections that --
7 legal issues that may be implicated by the motion that was
8 filed for the DIP financing, which is supposed to be heard
9 later, which hasn't been fully briefed yet, which may
10 determine what the total contours are of what's fair to ask
11 for in discovery. We're arguing today to figure out what we
12 can ask for in discovery, and I'm concerned about that
13 because we haven't had a chance to fully brief this.
14 There's significant legal issues that are being discussed
15 here, but I don't think all of us have a chance to brief that
16 just yet, so I'm concerned about that. So I'm not sure
17 whether --

18 THE COURT: Well, I don't know what to do about
19 that.

20 MR. GORDON: Yes.

21 THE COURT: It is a concern, but the fact is that
22 Syncora filed this motion, and the choice was deal with it
23 now or deal with it later, and the reason why I chose now is
24 because the city says it's got to get going on this loan.

25 MR. GORDON: Well, there seem to be a couple of

1 options here. One, I'm just trying to think this out --
2 think this through with you before we're --

3 THE COURT: Um-hmm.

4 MR. GORDON: -- prejudiced in some way because I
5 would like to be able to brief this if we're really going to
6 go down this path today. The discovery could be held in
7 abeyance while we file objections to the DIP financing and
8 claim that there's all sorts of reasonable business judgment
9 issues that the Court should be probing, and the Court could
10 then rule upon whether those are fair game or not subject to
11 discovery, but then we'll be into mid-December, and then
12 we'll be starting discovery. The city says that's not fast
13 enough for us. Everything has to be immediately because our
14 hair is on fire and everything else, and, you know,
15 everything has to be done like yesterday for reasons I'm not
16 exactly sure since they're accumulating cash in the meantime
17 and they're still paying payroll and so forth. That's one
18 option. Doesn't seem real efficient, but that's one option.
19 The other option --

20 THE COURT: Well, hold on.

21 MR. GORDON: Yes, sir.

22 THE COURT: I'm sure the city is as concerned as you
23 are about the fact that the retirement contributions aren't
24 being made.

25 MR. GORDON: I hope they're concerned about it. I'm

1 not sure, but I hope so. I'm sorry, your Honor. I'm not
2 sure if I'm following --

3 THE COURT: You missed my point.

4 MR. GORDON: I missed your point. I'm sorry.

5 THE COURT: Well, your point was there's no urgency
6 here.

7 MR. GORDON: Oh, I didn't say no urgency. I'm just
8 trying to think of what's prudent.

9 THE COURT: Well, your point was that there was no
10 urgency here, that we can wait till January.

11 MR. GORDON: Not necessarily, your Honor. The other
12 option is that we allow this discovery because it's not as --
13 certainly not as broad as what we just engaged in in the last
14 45 days in connection with eligibility, that we allow this
15 discovery, and if some of it turns out to, in your mind, not
16 be relevant, then I mean we've certainly incurred an expense.
17 There's no doubt about that. But if the urgency is more
18 important, then so be it, but I don't think we should be
19 precluded from at least taking the discovery and being fully
20 prepared to point out things. I think we all actually were
21 surprised at some of the things that came out in discovery
22 relative to the trial last week that -- anyway, I won't go
23 into that, but I do -- no problem. Sorry. So that's another
24 option is I mean, you know, if urgency is that important,
25 then the discovery seems to be fairly narrowly tailored. We

1 can discuss -- I haven't had a chance to really think about
2 it. We can discuss whether the swap participants are
3 necessary.

4 THE COURT: It's hard for me to see how discovery on
5 the subject of how the city should spend \$350 million is
6 anything but gigantic, enormous.

7 MR. GORDON: Yes. I totally agree, and I think that
8 the suggestion that 364(c) --

9 THE COURT: I mean because that opens up the
10 possibility that any objecting party -- and by that I mean
11 objecting to the motion -- can call its own expert or experts
12 to testify about how he or she from an urban planning
13 perspective thinks this money ought to be spent.

14 MR. GORDON: Well --

15 THE COURT: Wow.

16 MR. GORDON: -- as your Honor knows, it's a
17 reasonable business judgment standard. It's not reinventing
18 the wheel. To suggest, as city council -- as city's counsel
19 has, that 364(c) in the context of Chapter 9 doesn't even
20 implicate reasonable business judgment -- at least that's
21 what I was hearing --

22 THE COURT: Yeah.

23 MR. GORDON: That seems pretty big to me. That
24 seems a bit odd. That kind of reads 364(c) out of Chapter 9,
25 which is not the case.

1 THE COURT: Well, no.

2 MR. GORDON: I don't know how you -- I don't know --

3 THE COURT: I think the argument is you reconcile
4 364(c) with 904.

5 MR. GORDON: And how do you do that? I mean I
6 didn't hear anything here that could parse that and -- well
7 enough to say that we shouldn't be talking about what is
8 reasonable business judgment in terms of what you're going to
9 use this for if you're going to incumber unincumbered assets
10 that could otherwise be used in various ways and which are
11 not being proposed -- these initiatives are not being
12 proposed in the context of an overall Chapter 9 plan.
13 They're saying they need to commence these things, but
14 they're not doing it in the context of a Chapter 9 plan.
15 They're doing it outside of a plan. I think there are
16 serious implications there.

17 THE COURT: So you think, just to summarize, that
18 the city should go with an understaffed police department, an
19 understaffed fire department, 40 percent of lights lit, I'm
20 not sure how many tens of thousands of abandoned properties,
21 until a plan is confirmed?

22 MR. GORDON: No, your Honor, but I'm not -- I am not
23 sure that the \$150 million portion of the DIP loan has been
24 clearly identified as to what it will go for, so I think that
25 there are fair questions to be asked about that, but if it is

1 going to provide essential services, that would be a
2 different story. And as to the \$200 million portion of it,
3 of course, all subject to the arguments we've made -- that
4 all the parties have made regarding whether the swap
5 participants are even entitled to it, there needs to be some
6 analysis of whether if that part goes away, if the Court
7 determines that the swap participants are not secured
8 creditors, is the 150 million still there? How is that
9 affected? I don't know that we've fully analyzed that yet.

10 THE COURT: All right. Thank you.

11 MR. GORDON: Thank you, your Honor.

12 THE COURT: Before I get back to you, I want to ask
13 a question of the city because I want to give you the last
14 word. Sir, at the lectern, please.

15 MR. HAMILTON: Yes, sir.

16 THE COURT: I didn't quite hear your response on the
17 request for discovery regarding compliance with PA 436.

18 MR. HAMILTON: We have no -- we have no problem with
19 that. They wanted to take a deposition of a City Council
20 member. We took no position on that. We don't represent the
21 City Council. We would appear at the deposition if it
22 happens.

23 THE COURT: All right. Thank you. Sir.

24 MR. HACKNEY: Thank you, your Honor. I will be
25 brief, but the stakes are very high, and I think that the

1 legal position that the city is taking is breathtaking here
2 because you heard Mr. Hamilton say that when they come to you
3 on a 364 motion and they ask you to work the controls of the
4 Bankruptcy Code to their advantage, should you deign to
5 ask -- to probe behind what they're using the money for, why
6 they believe they need it and assess whether this borrowing
7 is in the best interest of creditors, apply some of those
8 different elements you heard both counsel and I talk about,
9 that if you're to do that, now you're sitting as a super
10 tribunal almost how dare you interfere with our
11 administration. You are now acting as a super tribunal when
12 there's no question that if they did these very plan-like
13 steps, paying \$220 million to a creditor, investing in the
14 city, revitalizing the city and pushing down on the creditor
15 stack to do so, if they did that in the context of a plan,
16 there is no question that the Court would be within its
17 rights to make all of those assessments, whether it's fair
18 and equitable, whether it's in the best interest of
19 creditors, those precise elements that are designed to
20 protect creditors and make sure that the plan is fair, that
21 it does fairly adjust the debts. The thesis here is, well,
22 why don't we just pull it forward because if we can pull it
23 forward out of the plan context, we can engage in a number of
24 these key set pieces with the Court where their position is
25 that they will come in and say, "In my judgment, it's

1 necessary, and you must defer to my judgment." You're given
2 no opportunity to assess, and you could give away the city,
3 so to speak, in the process of improving itself because you
4 could -- Detroit's challenges are well-known, and I'm
5 sympathetic to and sensitive to your questions. I don't mean
6 to be callous. I understand that there are issues with the
7 lights, with 911 response times, and I understand that there
8 are real people out there today that are living with these
9 challenges, and I'm not being callous, but I do want to say
10 this. They've been living with these challenges for a very
11 long time, and while it is important that --

12 THE COURT: This argument does not impress me,
13 counsel. Don't go there.

14 MR. HACKNEY: But while it's important, it is
15 something that must be fairly balanced with the other aspects
16 of the city's --

17 THE COURT: That's a fair point, but the fact that
18 they've been living with it for a long time --

19 MR. HACKNEY: Agree. Well, and --

20 THE COURT: -- is no justification for imposing it
21 upon them for another day.

22 MR. HACKNEY: I'm not trying to say that we should
23 make them wait for no reason at all. I am saying that there
24 is a good reason to approach this with both the benefit of a
25 fulsome record and with caution because, your Honor, even as

1 we talk about the business judgment rule in this context, I
2 think that your rulings on what the business judgment rule
3 means in Chapter 9 are going to be questions of first
4 impression in some respects, and I think they are going to be
5 momentous rulings. I know what it means in Chapter 11. I
6 deal with that a lot, and I know the Court does as well. But
7 when you talk about the way the business judgment rule works
8 in Chapter 11, it's not clear how it translates into Chapter
9 9. For example -- and don't -- this is not intended to be
10 flip or callous, but I'm trying to map these two things very
11 precisely. Are the citizens of the city, are they like the
12 equity in a Chapter 11? That would be -- that would be --

13 THE COURT: Those analogies are so imperfect that
14 it's not even worth trying.

15 MR. HACKNEY: There are challenges there, and so I
16 actually think that when you say what the business judgment
17 rule means under 364 in the context of Chapter 9, I think
18 that ruling is going to grapple with these concepts of
19 balance, necessity, rights of the citizens vis-a-vis rights
20 of the creditors, and I -- and those are the types of issues
21 that you would grapple with, I believe, in a plan. I don't
22 believe that the city can say that you are not entitled to
23 grapple with them in the context of 364.

24 I'd like to finish with one point. I want to thank
25 you for your patience. There's one thing that doesn't make

1 any sense to me about the city's position here today, which
2 is they are willing to allow us to take the deposition of Mr.
3 Moore, so he's the Conway MacKenzie consultant whose
4 deposition is a very colorful recitation of the challenges
5 and how they need the money to address the challenges, so
6 it's both about needs and uses. It doesn't square with me
7 that they're saying, yeah, you can depose Mr. Moore because,
8 of course, we're going to call him, and we are going to paint
9 a picture of the City of Detroit that justifies this loan for
10 Judge Rhodes, but we won't give you discovery that relates to
11 the work and the assessments and the types of things that he
12 engaged in and reviewed and considered in order to generate
13 the declaration that we attached. I don't see how those two
14 things fit with one another. If the needs and the uses are
15 irrelevant, why does it dominate their motion? Why is Mr.
16 Moore's declaration devoted entirely to it? Why is he
17 proposed as a witness? If those things make sense for the
18 city because they admit that they are relevant to their
19 motion, then the discovery on the uses and needs I believe
20 also would be relevant. I agree that while we can try to
21 minimize the burden, it will be substantial discovery because
22 of what you said. I'm not going to disagree with that, but
23 this is a big loan, and this is a big issue for the
24 creditors. We're talking about \$120 million on top of the
25 swap counterparty termination amount.

1 THE COURT: It's a big number, but it pales in
2 comparison to the numbers I heard the city needs for its
3 revitalization program over -- I think it was ten years.

4 MR. HACKNEY: I think that in some respects, your
5 Honor, the whole case is about that word "need," and I think
6 it's a hard question because I think that this is something
7 that's --

8 THE COURT: Isn't "hard" just another word for
9 political?

10 MR. HACKNEY: No. I think in this case it's
11 emphatically going -- it is certainly also a political
12 question that people wrestle with, that certainly the city
13 wrestled with before bankruptcy under the constraints that it
14 had to operate under. I think it is -- no matter how much we
15 struggle with the difficulty, it is a legal question, though,
16 for you because -- because necessity is something that
17 municipalities struggle with everywhere outside of
18 bankruptcy, when they come to bankruptcy and they now want to
19 confirm a plan and get out, they have to prove to you that
20 the steps that they propose to take, the recoveries that they
21 propose to offer are fair and equitable and are in the best
22 interest of creditors. In the case of the City of Detroit
23 that has these well-documented challenges -- and I won't
24 shirk from saying that they are significant challenges -- at
25 some point doesn't Kevyn Orr just come in and say, "Why would

1 I ever give creditors a dollar? I mean the needs here are
2 substantial, and I intend to invest not a billion" --

3 THE COURT: A lot of people think that's what he
4 already said.

5 MR. HACKNEY: I guess I would say he's come
6 relatively close to it, but I'll finish with one point, which
7 is you can see there's a logical way to back into the fact
8 that the Court must be as vigilant, we believe, in the
9 interregnum period between eligibility and closing as it is
10 in confirmation. And the logical point is that if you put
11 the plan together that said we are going to revitalize the
12 city, improve services, speed up police officer response
13 time, protect our firemen, remediate blight, build parks, all
14 sorts of different types of things, and give the creditors
15 nothing or very little, pretend that the plan said that --
16 some people feel that the plan does say that today, but
17 pretend in this hypothetical the plan said that and it didn't
18 marshal any creditor support, it wouldn't be a confirmable
19 plan that would allow the city to exit, so you know that in
20 the backdrop of all of this, the need to have at least some
21 creditor support -- and the history of Chapter 9 indicates --

22 THE COURT: Well, it's way premature to come to the
23 conclusion about what plan is confirmable and what isn't.

24 MR. HACKNEY: This motion --

25 THE COURT: There are provisions for cramdown --

1 MR. HACKNEY: There are.

2 THE COURT: -- in Chapter 9.

3 MR. HACKNEY: There are, but those provisions
4 still --

5 THE COURT: A plan can be confirmed with no creditor
6 support.

7 MR. HACKNEY: Well, at least an impaired assenting
8 class I would expect even in cramdown, but understood. You
9 could have a small minority, but it would still have to
10 satisfy all those factors of what's fair and equitable,
11 what's in the best interest of creditors.

12 THE COURT: True.

13 MR. HACKNEY: Those never go away, and I think
14 that's the difference between when you come to a bankruptcy
15 judge in a Bankruptcy Court and start asking for these unique
16 aspects of the Code is that that is the perspective, and this
17 is one of the things we intend to brief for you in our
18 objection because I do want to -- it is absolutely
19 complicated and I believe reasonably a first impression.
20 We've been --

21 THE COURT: All right. I'm inventing a process here
22 that I think will at least go some good measure of the way
23 toward accommodating everyone's interest here because I think
24 there -- I think there is merit in the concerns that you have
25 raised and that Mr. Gordon have raised about process here, so

1 here's the best I can come up with to try to accommodate
2 everyone's interest here. The first is between now and when
3 we start the hearing to limit discovery in the ways that the
4 city has proposed or, in the case of PA 436, not opposed, and
5 then this will give you then an opportunity to brief more
6 fully than we have in connection with today's hearing the
7 issue of what is the appropriate scope of the Court's review
8 of this motion under Section 364(c). And then in the context
9 of that hearing, which the Court will take so much evidence
10 as the city thinks is relevant to the motion, according to
11 its view of the scope of the Court's review, the Court will
12 then decide whether, based on its determination of the scope,
13 that the record is complete or to provide for further
14 discovery on a more expanded scope of review, so I know it's
15 a little bit more cumbersome and complex, but I think there
16 is merit in trying to make a determination of the scope of
17 review in a more fulsome way than this discovery motion has
18 allowed us to do, so that will be my order at this point in
19 time. I will try to prepare an order that perhaps more
20 articulately sets forth what I'm trying to do here than I
21 have been able to on the record here.

22 MS. CONNOR COHEN: Thank you, your Honor.

23 MR. NEAL: Your Honor, just -- good afternoon again.
24 Guy Neal. Just a question on the objection deadline. I know
25 there's been talk potentially of having that date moved. I

1 believe it's --

2 THE COURT: What is the deadline now?

3 MR. NEAL: I believe it's on the 22nd, but I thought
4 that it might be moved to the 27th. I'm just not sure where
5 it stands today.

6 MR. ERENS: Your Honor, the notice that the debtor
7 sent out had set the 21st as the objection deadline. We've
8 already talked to Syncora because of the need to accommodate
9 discovery that we would move that objection deadline to the
10 27th. The debtor then would reply on the 4th consistent with
11 the order your Honor issued in connection with the 10th, the
12 hearing on the 10th, and then we'd have the hearing on the
13 10th.

14 THE COURT: All right. So if that's your
15 stipulation, you may submit that, but you'll engage in
16 discovery in the meantime. Is that the idea?

17 MR. HACKNEY: It is.

18 THE COURT: All right.

19 MR. HACKNEY: Your Honor, can I ask one clarifying
20 fact?

21 THE COURT: Sure.

22 MR. HACKNEY: I promise not to hector you to death
23 with questions, but the one --

24 THE COURT: Thank you.

25 MR. HACKNEY: The one thing that I do want to

1 understand because I don't want to violate this order, which
2 is Mr. Moore's deposition, because -- can I --

3 THE COURT: The city has offered it up. You take --
4 you ask him whatever questions you want to ask him.

5 MR. HACKNEY: Okay. That's the best way because
6 then we don't have to do them twice or whatever. I just
7 wanted to clarify that. Thank you.

8 MR. ERENS: Also, I should make clear, your Honor,
9 we would try, if it was okay with your Honor, to have the
10 objection deadline moved to the 27th only for parties who
11 felt they needed to participate in discovery. If parties did
12 not think they needed to participate in discovery, we'd like
13 to get those objections so that we can start reviewing them.
14 The city will not have a long period of reply.

15 THE COURT: Can you readily identify those parties
16 or are we going to have a dispute about which parties and
17 which category?

18 MR. ERENS: We will certainly try, so we'll do our
19 best.

20 THE COURT: All right. Well, I'll trust you to try
21 to work it out. If there are issues, you can get me on the
22 telephone.

23 MR. ERENS: Okay. Thank you.

24 (Hearing concluded at 3:40 p.m.)

INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

November 19, 2013

Lois Garrett

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846
MICHIGAN, .
 . Detroit, Michigan
 . November 27, 2013
Debtor. . 11:19 a.m.

HEARING RE. CITY OF DETROIT'S MOTION FOR ENTRY OF AN
ORDER ESTABLISHING PRE-TRIAL AND TRIAL PROCEDURES AND
SETTING ADDITIONAL HEARINGS (DOCKET #1788)
BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Jones Day
By: GREGORY SHUMAKER
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(212) 879-3679

Miller, Canfield, Paddock & Stone, PLC
By: TIMOTHY A. FUSCO
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 496-8435

For Detroit Retirement
Systems - General Retirement System
of Detroit, Police and Fire Retirement
System of the City of Detroit: Clark Hill, PLC
By: ROBERT D. GORDON
151 South Old Woodward, Suite 200
Birmingham, MI 48009
(248) 988-5882

For Detroit Entertainment,
LLC - Motor City Casino and Greek-
town Casino, LLC: Honigman, Miller, Schwartz & Cohn, LLP
By: JUDY B. CALTON
660 Woodward Avenue, Suite 2290
Detroit, MI 48226
(313) 465-7344

APPEARANCES (continued):

For Syncora: McDonald Hopkins, PLC
 By: JOSHUA A. GADHARF
 39533 Woodward Avenue, Suite 318
 Bloomfield Hills, MI 48304
 (248) 593-2942

Quinn Emanuel Urquhart & Sullivan, LLP
 By: SUSHEEL KIRPALANI
 JAKE SHIELDS
 50 Madison Avenue, 22nd Floor
 New York, NY 10010
 (212) 849-7000

For Erste
 Europäische
 Pfandbrief-und
 Kommunalkreditbank
 Aktiengesellschaft
 in Luxemburg, S.A.: Ballard Spahr, LLP
 By: VINCENT J. MARRIOTT, III
 1735 Market Street, 51st Floor
 Philadelphia, PA 19103-7599
 (215) 864-8236

For the Swap
 Counterparties: Warner, Nocross & Judd, LLP
 By: STEPHEN B. GROW
 900 Fifth Third Tower
 111 Lyon Street, N.W.
 Grand Rapids, MI 49503-2487
 (616) 752-2158

Court Recorder: Letrice Calloway
 United States Bankruptcy Court
 211 West Fort Street
 21st Floor
 Detroit, MI 48226-3211
 (313) 234-0068

Transcribed By: Lois Garrett
 1290 West Barnes Road
 Leslie, MI 49251
 (517) 676-5092

Proceedings recorded by electronic sound recording,
 transcript produced by transcription service.

1 MR. SHUMAKER: Good morning, your Honor. Greg
2 Shumaker of Jones Day for the City of Detroit.

3 THE COURT: Before you proceed, did anyone ever show
4 up on the Mobley matter?

5 MR. FUSCO: Your Honor, we reached Mr. Rose finally.
6 He apologized. He said he just inadvertently did not see the
7 notice for today and asked -- and we have no objection to
8 moving this to the next hearing date.

9 THE COURT: Okay. You may submit a stipulation and
10 order that accomplishes that.

11 MR. FUSCO: Thank you.

12 THE COURT: All right.

13 MR. SHUMAKER: Your Honor, to resume, the city filed
14 this motion in an effort to gain your guidance in the lead-up
15 to the upcoming hearings on what we referred to as the
16 assumption motion and the DIP or the post-petition financing
17 motion. As your Honor knows, you set aside December 10th,
18 11th, and 12th for the hearings on those motions, and what we
19 do in our motion is to lay out a proposed schedule to try
20 to -- to order things in the lead-up. You know, I don't
21 think there's anything surprising in what the city has
22 proposed there. It's, if you will, in some ways a redo of
23 what we did with the eligibility motion in terms of setting a
24 date for will call and may call witnesses, exhibit lists. We
25 would suggest simultaneously exchanging those on Friday.

1 That's not the most convenient day on -- in the calendar, but
2 we are --

3 THE COURT: It's more convenient than tomorrow.

4 MR. SHUMAKER: That it is, your Honor. It is
5 certainly that. We thought so, so we suggested Friday. But
6 all of it is sort of back-engineered from the hearing dates,
7 and, you know, we've got our will call and our may call
8 witness list again, the exhibit list. We talked, your Honor,
9 with regard to the assumption motion hearing that your Honor
10 thought it would be helpful to have a joint statement of
11 facts, so we've been working -- actually, back in September
12 the city was working with the objectors on that effort, and
13 that would resume, and we presume it would also be helpful to
14 the Court to have one with regard to the DIP motion as well
15 and also have a joint exhibit list which would specify
16 obviously the exhibits that might be introduced at the
17 hearing and give the parties an opportunity to object and for
18 the Court to have something to look at and resolve matters as
19 we proceed to the hearings.

20 We also indicated that we -- in our motion we set
21 forth the witnesses that we believe will testify, and what we
22 did there gets into one of the issues that we were really
23 seeking the Court's guidance on, which is whether the Court
24 would like the -- it to be one or two hearings. We believe
25 that for the convenience of the parties, the convenience of

1 the witnesses, and certainly the convenience of the Court as
2 well as the fact that the initial assumption motion hearing
3 was adjourned in part because a number of objectors had said,
4 "Hey, we can't really assess the reasonableness without
5 knowing what the financing situation is," so we see them as
6 going hand in hand, and that's why we suggested the hearing
7 would be one consolidated hearing. We could have arguments
8 however the Court would want to set that up, but for purposes
9 of putting the witnesses on the stand, we would offer that
10 the witnesses would take the stand and testify with regard to
11 both, whatever their testimony is on the assumption motion
12 and then also with regard to the DIP motion as opposed to
13 having them step down after being cross-examined and then
14 bringing them back, so that's why we -- and we've -- the five
15 witnesses that we believe we'll be putting forth, your Honor
16 has already heard testimony from all of them, Mr. Orr,
17 Mr. Malhotra, Mr. Buckfire, Mr. Moore, and Mr. Doak.

18 Now, the declarants in support of the DIP motion
19 were Mr. Doak and Mr. Moore. Your Honor heard a couple weeks
20 ago their testimony in connection with the motion for
21 discovery. We also believe -- we don't believe that there
22 will be significant amounts of testimony from Mr. Orr,
23 Mr. Buckfire, or Mr. Malhotra on the DIP motion, but they did
24 play roles, and they may well get into that on the stand.
25 And we wanted to afford the objectors the -- we wanted to

1 advise them of that and then afford them the ability to have
2 what we would hope would be short depositions because they've
3 already been deposed in connection at least with the
4 assumption motion, so all of those were set up.

5 We also would like -- and I think it's only fair
6 that if the objectors are going to put forth rebuttal
7 witnesses, as they did with regard to the eligibility motion,
8 the city would like the opportunity to be able to depose
9 them, hence including a request that on Friday, which is
10 pretty close, but the -- because objections to the DIP motion
11 are due today, that they declare who their rebuttal witnesses
12 are because we need to depose them in advance of the hearing
13 ten days hence starting at the beginning of next week. So
14 that's kind of what we were doing.

15 Now, we also -- so in terms of the scheduling, we
16 also -- one other matter that we were seeking your Honor's
17 advice on was the length of the hearing because, as your
18 Honor recalls, with regard to the assumption motion hearing,
19 it was going to be four hours for the city to put on its
20 case, five hours for the objectors. We suggested seven and
21 eight, and, your Honor, we believe that's a doable and --
22 hopefully for both sides.

23 We've also suggested -- I think your Honor used this
24 in the November 18th hearing, and I think it would be helpful
25 if there was some way of having a lead cross-examiner of the

1 witnesses if there's -- we recognize there are different
2 interests at play, but perhaps if they were to categorize
3 them by groups, but when your Honor did that with the cross-
4 examinations of Mr. Doak and Mr. Moore, it certainly went
5 more smoothly. And because this is a summary proceeding, in
6 general, we suggest that that might be advisable as well.

7 Now, with regard to the schedule that we proposed,
8 the objectors have kind of said, you know, we don't really
9 object to what you're -- well, there are some things that
10 they object to, but in general setting some dates and
11 deadlines makes some sense, but it seems rather hurried to us
12 because there's so much that's going to have to be done in
13 the next couple of weeks, and there's an intervening holiday.
14 And they've sort of suggested some proposals. I wanted to
15 share with your Honor the concern that the city has about
16 doing that, and not to be presumptuous, but it's actually
17 somewhat of a concern for your Honor because the city is
18 going to be asking -- as you know, we've been trying to
19 proceed as expeditiously as possible with regard to these
20 motions because we believe the forbearance agreement -- we
21 want to -- we want to implement it, of course, and we
22 obviously want to fund it as well through the DIP motion. We
23 need orders from your Honor to do that. As things currently
24 stand, you heard some testimony about the Barclays commitment
25 letter on the 14th and how it operates, and right now the

1 Barclays commitment expires -- to fund the DIP loan expires
2 on January 7th, 2014. And given how the forbearance
3 agreement operates and the obviously -- the obvious need to
4 fund the forbearance agreement, we believe that it's
5 necessary to have eight business days in advance. The
6 forbearance agreement would require the city to give notice
7 to the swap counterparties that it has the ability to pay, it
8 has received an order, and it has the financing to do what
9 it's doing, and that's a seven-day notice period -- seven-day
10 business notice -- I'm sorry -- seven-business-day notice
11 period. If you back out from January 7th, a day upon which
12 Barclays, by the terms of the city's agreement with them,
13 could walk away from its commitment, if you back up those
14 seven business days plus one for logistics -- that's the add-
15 on -- you come to December 26th as the date that the city
16 would be asking your Honor to provide an order, which may not
17 be perhaps the most convenient -- another perhaps
18 inconvenient date on the calendar especially if, as the
19 objectors have proposed, how about we move the hearing back
20 from the 10th, 11th, and 12th to the 17th, 18th, and 19th.
21 By my count, that's a week at a tough time of year, and so
22 obviously the city wants to be reasonable and accommodate,
23 you know, all of the parties' interests as best it can, but
24 it would put a -- we worry, a burden on the Court that's
25 worrisome. We would prefer not to do that, and that's why we

1 think that, you know, sticking to the December 10th, 11th,
2 12th is the better way to go because it gives your Honor more
3 time to do what you need to do as opposed to issuing an order
4 from the bench at the end of the hearing or doing something
5 in those seven days. So that's, you know, our suggestion. I
6 could run through those dates, your Honor, and go through,
7 you know, the pros and cons, but I think your Honor gets all
8 that. I actually have a calendar that prints it all out
9 nicely. If your Honor would like it, I'm happy to give you
10 that. But this -- I want to emphasize for the Court -- and I
11 know it was discussed at the hearing on the 14th -- but that
12 January 7th date is an important date because by then the
13 complete commitment fee that the city has agreed to pay in
14 order to get Barclays' commitment to fund -- to provide the
15 \$350 million will have been paid. That's over \$4 million.
16 And if we don't hit that date, Barclays is able to walk away,
17 and that has obviously significant consequences, I mean,
18 because if they walk away, we don't have our DIP loan, and we
19 can't set forth -- take the steps that we think are so vital
20 to not only taking out the swaps, if you will, by way of the
21 forbearance agreement but also to get access to those quality
22 of life proceeds and implement the kinds of steps, blight,
23 addressing blight and whatnot, so that's the conundrum that
24 we currently find ourselves on, and I wanted to raise that
25 with your Honor.

1 The other aspect of our motion, which I'll touch on,
2 which is -- and I think I touched on most of the
3 objectors' -- the joint objectors' -- or the objectors' joint
4 response. Syncora also raises -- it has its own independent
5 objection, and, your Honor, you know, that objection -- we
6 think it's time to deal with the Syncora -- the consent right
7 issue. As your Honor knows, Syncora's basis for objecting to
8 the assumption motion is bound up in its consent rights as a
9 swaps insurer, and that issue has come up in other contexts.
10 It has come up in connection with the lawsuit that the city
11 was forced to file back on July 5th to gain a temporary
12 restraining order in order to continue to receive the casino
13 revenues. That obviously predates the forbearance agreement,
14 which was a couple weeks later, but Syncora's defense to its
15 actions, which -- of the city's complaint is bound up in
16 these consent rates as well as the fact that after the
17 bankruptcy was commenced, as your Honor knows, Syncora went
18 to New York state court and filed an action against the swap
19 counterparties, and that action was removed and transferred
20 to the Eastern District of Michigan, and then -- I guess it
21 was as of the beginning of last week Judge Goldsmith referred
22 it to your Honor, so now all the bouncing Syncora consent
23 right balls are in sort of one bin now in front of your
24 Honor, which we think is the appropriate spot for those balls
25 to be. And we believe that given the fact -- I'll be shocked

1 if in Syncora's objection -- well, first of all, I'll be
2 shocked if Syncora doesn't object today to the DIP motion,
3 but I'll also be shocked if that's not bound up in the
4 consent right issue. And because there is a pending motion
5 to dismiss in the adversary proceeding that is -- the only
6 thing that's necessary is a reply brief, which I think
7 actually may have been filed yesterday, that's fully briefed,
8 and the city has moved to intervene in that case for what we
9 think are obvious reasons. We have put in our motion a
10 suggestion to your Honor that you hear the motion to
11 dismiss -- actually, hear our motion to intervene to allow
12 the city to get into the action and then hear the consent
13 right issue because that's going to be a way of resolving
14 these consent rights, which, your Honor, I think we believe
15 you must do in connection with Syncora's objection in any
16 event. And so that's kind of bound up in this motion. I
17 don't know what your Honor would like to do about the timing
18 obviously, and -- but that's why we raise it because it is --
19 at least the Syncora consent right issue is what we view very
20 much a threshold issue and could impact the progress of the
21 Court's substantial -- of the -- I'm sorry -- the hearing
22 substantially when it comes before your Honor.

23 And I just would -- one additional -- just to
24 emphasize something that's obvious to your Honor, and I hate
25 to say this, but we were -- the city very much believes that

1 your Honor should be deciding the consent right issue. I
2 mean you are forced to get familiar with some fairly
3 complicated documentation in connection with Syncora's
4 objection. It obviously has a clear impact on the city's
5 revenues and the city's access to an incredibly important
6 revenue stream, and, again, all the balls now are in front of
7 you, and that's why we would submit that your Honor should
8 deal with it when you can.

9 THE COURT: Thank you, sir.

10 MR. SHUMAKER: Thank you, your Honor.

11 MR. GORDON: Good morning, your Honor. Good
12 morning, your Honor. Robert Gordon of Clark Hill on behalf
13 of the Detroit Retirement Systems. Your Honor, I'm actually
14 here today presenting the joint response of a large group of
15 objecting parties, so I have the solemn task of speaking on
16 behalf of, in some respects, my last count was at least 14
17 parties who all signed onto this joint response that we filed
18 yesterday.

19 THE COURT: Um-hmm.

20 MR. GORDON: I think that the genesis of the joint
21 response was, in part, due to the parties speaking amongst
22 themselves and realizing that they had common concerns and
23 recognizing also that if we could put it all into one
24 document rather than 14 documents, it might help the Court.
25 I hope it was helpful.

1 THE COURT: Yes.

2 MR. GORDON: And then I suspect it was also helpful
3 to out-state counsel to task me with presenting today so they
4 might avoid traveling on the day before the holiday. In any
5 event, I guess, your Honor, I'm a little -- I don't know if
6 the word is "dismayed," and maybe the Court is as well, that
7 we're having a contested hearing on pretrial procedures and
8 scheduling matters. Hopefully those could usually be worked
9 out to some extent, but if I may, I'd like to describe how
10 we've gotten here today. Your Honor, we were before this
11 Court on November 14th discussing discovery in connection
12 with the financing motion.

13 THE COURT: Well, I'll give you a brief opportunity
14 to do this, but mostly what I'm interested in is what do I
15 have to decide, what do you disagree on, what do you want to
16 do.

17 MR. GORDON: Yes. I understand, your Honor.

18 THE COURT: But go ahead.

19 MR. GORDON: I'll be brief. We were here on the
20 14th, and at that time there was a discussion of the timing
21 of taking the depositions of Mr. Doak and Mr. Moore and only
22 Mr. Doak and Mr. Moore. The city did not indicate that it
23 intended to call any other witnesses for the financing motion
24 and, in fact, opposed Syncora's request to depose Mr. Orr.
25 If the city was planning to call other witnesses, one would

1 have hoped that they would have mentioned it at that time.
2 They did not. They also did not mention that they desired to
3 take the depositions of the objecting parties' witnesses at
4 that time. Apparently subsequently the city decided
5 otherwise, had a change of heart, and in the intervening
6 eight days they could have reached out to the objecting
7 parties, but they did not. Instead, last Friday at about
8 three o'clock in the afternoon they simply filed a motion and
9 asked for an expedited hearing. The motion, your Honor, in
10 short, asks for procedures and deadlines that are illogical
11 and unworkable, and I'll get into that in one moment. Your
12 Honor, the local rules, 9014-1, requires that a party filing
13 such a motion must seek the concurrence of parties or
14 otherwise assert that it was infeasible to do so, and the
15 section of the motion filed by the city states -- and I will
16 just quote directly from it at page 10 -- "The city sought
17 concurrence in this motion from Syncora, but such concurrence
18 was not obtained. Given the large number of objectors and
19 potential objectors, paren, some of whom are not yet known to
20 the city, end paren, comma, it is not feasible for the city
21 to seek concurrence in this motion from all parties.
22 Accordingly, the city respectfully requests that such
23 requirement be waived as to those additional parties,
24 period," end quote. In other words, the city didn't reach
25 out to any of the parties that appeared at the November 14th

1 hearing other than Syncora. It knew of all the parties that
2 have objected to the swap motion, which is part of what this
3 pretrial procedure is all about. That's a finite number of
4 parties. It's probably less than ten. They didn't reach out
5 to any of them either.

6 We filed our joint response as of noon yesterday,
7 your Honor. It's pretty straightforward. In the interim,
8 again, the city has not reached out to us to try to resolve
9 these matters. We actually during the break here reached out
10 to counsel to try to resolve it to no avail.

11 Your Honor, as we've mentioned in -- described in
12 our response, the deadlines are just not workable. They
13 are -- the city is suggesting that all witnesses, will call
14 and rebuttal witnesses, should be identified by this Friday
15 before we've done depositions, before we've been able to
16 fully review 20,000 documents that were produced just last
17 week. We submit that that's truly impossible and prejudicial
18 to have to identify all witnesses, including rebuttal
19 witnesses, by this Friday. The identification particularly
20 of rebuttal witnesses clearly has to take place after
21 depositions have been taken.

22 Mr. Shumaker says that this is the same procedure
23 that was used in the eligibility hearings. I don't recall
24 that to be the case. I believe that the designation of
25 witnesses took place after some significant and fulsome

1 deposition discovery had already been taken, so the procedure
2 here is very different and very prejudicial.

3 It also -- the city also suggests that the exhibit
4 list and the joint statement of facts and the pretrial order
5 would be submitted on December 6th, the day after the
6 completion of the deposition of Mr. Moore and before
7 depositions have been taken of Mr. Orr, Mr. Malhotra, or Mr.
8 Buckfire, who are all now indicated to be taking the stand
9 for the financing hearing. That's simply not workable, and
10 depositions will not have been completed, so -- and that
11 doesn't even include the taking of the depositions by the
12 city of any of the objecting parties' witnesses. So
13 apparently the city --

14 THE COURT: Who are you going to call?

15 MR. GORDON: I'm sorry.

16 THE COURT: Who are you going to call?

17 MR. GORDON: Actually, myself, your Honor, I don't
18 know that we are going to call anybody, and I haven't had a
19 chance to talk with the other parties to see who they would
20 call. And certainly obviously we'd have to identify them
21 within a reasonable period of time and allow them to take
22 them, but I don't know who that would be, your Honor. It may
23 be a very limited number, and I would think it would be, but
24 I don't know.

25 So, your Honor, it's simply putting the cart before

1 the horse. They're asking us to designate things before
2 we've even had a chance to review fully 20,000 documents and
3 take certain depositions at least and see what comes out of
4 those depositions to determine what exhibits we might want,
5 whether all the documents have been produced, whether there's
6 other documents that need to be produced and so forth.

7 Having said all that, we understand that everyone
8 wants to move quickly, and we're suggesting a solution for
9 that, and that solution is -- with respect to the financing
10 motion is that the dates be moved modestly one week. Well,
11 let me say the trial dates moved one week. The deposition
12 deadlines that -- the city is asking for the 9th. With the
13 addition of Mr. Orr, Mr. Buckfire, and Mr. Malhotra, and the
14 city's desire to depose anybody on the objecting parties'
15 side, that's just not going to be possible, but we're only
16 asking to move that date, we're suggesting, to December 11th,
17 two days, from December 9th to December 11th for a deposition
18 cutoff. By December 13th we could submit a joint statement
19 of facts, designation of witnesses and exhibit lists, and,
20 your Honor, I would actually suggest -- and I don't know if
21 the Court would indulge us in this regard. I would suggest
22 that perhaps there should actually be a pretrial conference
23 on the 13th, that Friday, because I can't imagine with things
24 moving this fast that we're going to not have some issues.
25 One of those issues, in particular, is something that I think

1 is being asked for prematurely today by the city, which is to
2 determine how much time is needed by both parties and who
3 should be conducting the trial on behalf of the 14 or more
4 objectors. I think that all has to be figured out with the
5 parties, and they need time to do that. And I think if there
6 was a pretrial conference, that would be an excellent
7 opportunity to discuss those things before the trial, but
8 today seems difficult and premature to do that. So, your
9 Honor, we're only asking to move the trial dates by a week
10 and to allow time for depositions. We asked this --
11 suggested this to Mr. Shumaker, and the response was what you
12 heard, that the swap parties need an eight-day notice period
13 and that if you back that up, that gives the Court not a lot
14 of time to issue a ruling. I would suggest that the swap
15 parties, first of all, have adjourned certain dates in the
16 forbearance agreement to allow the trial to take place
17 already and that the due process rights of the 14 objectors
18 shouldn't be held hostage by the swap parties standing on
19 ceremony needing eight days' notice of something that they
20 don't need eight days' notice of. Yes, your Honor.

21 THE COURT: I'd like your permission actually to
22 take a pause --

23 MR. GORDON: Yes, sir.

24 THE COURT: -- and suggest to you that I agree with
25 you that the trial is too rushed at this point and that we

1 should go the week of the 16th. Now, Chris says we have
2 motions on the 16th. What are those?

3 MR. GORDON: You do. You have a number of motions.

4 THE COURT: A number of motions, so we may have to
5 go like the 17th, 18th, and 19th instead of 16th, 17th, and
6 18th. Okay?

7 MR. GORDON: And that's what we have suggested.

8 THE COURT: So what I want to do is suspend this
9 hearing and ask all of you to try to agree on what the
10 schedule will be between now and December 17th. Are you
11 willing to do that?

12 MR. GORDON: Absolutely, your Honor.

13 THE COURT: Not willing to do that? Ms. Calton is
14 not willing to do that.

15 MS. CALTON: Could I just make a statement, please?

16 THE COURT: Of course. Step forward.

17 MS. CALTON: Judy Calton for Greektown Casino and
18 Detroit Entertainment, which is Motor City Casino Hotel, and
19 we filed rather limited objections to the financing motion.
20 This is unique in my career. I'm representing collateral,
21 and --

22 THE COURT: Right.

23 MS. CALTON: -- they're heavily regulated, and if
24 things aren't done pursuant to the regulations, they could be
25 sanctioned, fined, lose their license, which would interrupt

1 this important income stream, and we believe that the
2 proposed documents as drafted now put us at risk. We're
3 talking with the city and Barclays on changes. I'm extremely
4 optimistic that it will happen, but if for some reason it
5 doesn't happen, the city has agreed we could get up and argue
6 at the hearing without having to go through the discovery and
7 being part of the pretrial. I just wanted to get that on the
8 record. We don't care about the dates and that kind of
9 thing.

10 THE COURT: All right. One more? Who wants to just
11 comment?

12 MR. GADHARF: Hello, Judge. Joshua Gadharf on
13 behalf on behalf of Syncora. The Court graciously allowed
14 the Quinn Emanuel firm, who's representing Syncora in the --
15 on their objection, to appear telephonically --

16 THE COURT: Um-hmm.

17 MR. GADHARF: -- so Mr. Susheel Kirpalani and Jake
18 Shields are both on the line, and I just wanted to make sure
19 that they did not want to weigh in on the matter as well.

20 THE COURT: Thank you.

21 MR. KIRPALANI: Thank you, your Honor.

22 THE COURT: Is there anyone on the line who --

23 MR. KIRPALANI: This is Susheel Kirpalani from Quinn
24 Emanuel, and I have my colleague, Jake Shields, with me. I
25 do want to thank the Court for allowing us to appear

1 telephonically for this matter.

2 THE COURT: Okay.

3 MR. KIRPALANI: In the future we would, of course,
4 come and appear in person. The issue for Syncora and for the
5 aspects of the Syncora matter that we handle for the client
6 is different than the ones that your Honor is already dealing
7 with. Let me try to narrow down what the issue actually is.

8 THE COURT: No. Sir, I'm going to -- I'm going
9 to --

10 MR. KIRPALANI: Your Honor --

11 THE COURT: Sir, can you hear me?

12 MR. KIRPALANI: Yes.

13 THE COURT: Okay. I'm going to interrupt you
14 because I'm going to ask you to participate with the
15 attorneys here in trying to work this out. If you can't,
16 then I'll deal with it, but I want to give you the lunch hour
17 here to try to -- to try to encourage all of the attorneys to
18 work together to narrow your issues hopefully to none, but
19 whatever is left I will deal with, so let's take --

20 MR. KIRPALANI: Thank you, your Honor.

21 THE COURT: Let's take a lunch break now and
22 reconvene at one o'clock.

23 MR. GORDON: Your Honor, if I may, there's the one
24 issue that we haven't really discussed, and I don't know if
25 you're folding that into our discussions or whether that's

1 something that is better left to your Honor, is the issue of
2 whether they should be two hearings or one hearing. There is
3 no doubt that there is a relationship between the swap
4 motion, if you will, and the DIP financing motion, if you
5 will. They're related, but the inquiries are different, and
6 they're --

7 THE COURT: My preference is to try them together.

8 MR. GORDON: Is it also possible in that regard
9 because you'll see in our papers we mention the fact that
10 there are different attorneys from different -- each firm
11 that are handling those two parts -- is it possible that we
12 might have a hearing with -- on certain issues that are --
13 and then hearings on the other issues, keep them discrete, at
14 least, so that the record is clear as to which -- we'll talk
15 about it. I understand, your Honor.

16 THE COURT: Yeah. And I'm willing to be very
17 flexible on that, you know, recognizing the different
18 interests that are involved, so, you know, I'll just ask you
19 all to be creative on how to solve that problem. You can
20 figure it out.

21 MR. GORDON: Very well.

22 THE COURT: All right. I'll see you at one.

23 MR. GORDON: Thank you, your Honor.

24 THE CLERK: All rise. Court is in recess.

25 (Recess at 11:52 a.m. until 1:00 p.m.)

1 THE CLERK: Court is in session. Please be seated.
2 Recalling Case Number 13-53846, City of Detroit, Michigan.

3 THE COURT: Is everything okay with our technology,
4 Chris?

5 THE CLERK: I believe --

6 MR. SHUMAKER: Good afternoon, your Honor. For the
7 record, Greg Shumaker of Jones Day for the City of Detroit.
8 That was an excellent idea your Honor had. During break I'm
9 pleased to report that all of us gathered in the cozy
10 conference room and developed a calendar between now and a --
11 hearing dates of December 17th, 18th, and 19th. I'm happy to
12 run through that, your Honor, if you'd like me to.

13 THE COURT: Yes, please.

14 MR. SHUMAKER: The new revised calendar starts as
15 follows, and I apologize in advance because some of this is
16 my own scribbling, and I'm doing the best I can here to
17 interpret that, but on Monday, December 2nd, the objectors
18 are going to identify their direct witnesses. These would be
19 the witnesses that they are aware of right now who would
20 testify at the hearing or might testify at the hearing so
21 that we can get their deposition set. There's nothing
22 occurring on the 3rd, although I'm sure there will be a lot
23 of things which are just not on my calendar.

24 On Wednesday, December 4th, the -- there will be the
25 deposition of Charles Moore here in Detroit, and the city is

1 going to provide a draft of the joint statement of facts to
2 the objectors on that date. On Thursday, December 5th, there
3 will be a deposition of James Doak. I believe that will be
4 in Detroit, although I'm not certain of that. On Friday
5 there will be a deposition of Ken Buckfire. The parties are
6 tabling for now the issue of the length of those depositions
7 until we see the objections, and then we're going to see if
8 we can come to some agreement there.

9 On Monday, December 9th, then, your Honor --
10 December 9th, tentatively we're going to set the Orr
11 deposition on that date on the DIP motion issues. Also at
12 that time the parties plan on submitting exhibit lists to the
13 Court on that date, and the parties will reserve the right to
14 supplement those because the depositions will not be
15 finalized on that date. Then on Tuesday, December 10th, the
16 continue -- well, no. I shouldn't say continued. The
17 deposition of Mr. Malhotra would take place. It's unclear
18 right now in which location. On December 11th -- oh, I'm
19 sorry. One other thing on Tuesday, the 10th. We are
20 penciling in those days for the depositions of the direct
21 witnesses that the objectors identify on December 2nd, both
22 the 10th and on the 11th. We have penciled in those days.
23 And then also on the 11th continuing would be the parties'
24 deadline for submitting the joint statement of facts to your
25 Honor.

1 Moving to the 12th, on that date at noon would be
2 the deadline for the objectors to provide the city with the
3 names of any rebuttal witnesses regarding things that might
4 come up during the depositions that occur, and the deposition
5 dates for those rebuttal witnesses have been tentatively set
6 aside as Friday, the 13th, and Monday, the 16th. Then on
7 Friday, the 13th, we were going to ask your Honor if you
8 might schedule a pretrial conference as Mr. Gordon had
9 mentioned the possibility of. If you're able to, we were
10 hoping to cover the following subjects with you then, the
11 first being whether the city believes it necessary to put
12 Mr. Orr, Mr. Malhotra, or Mr. Buckfire up as an expert,
13 discussing that with your Honor as to whether -- what your
14 Honor's expectations are in that regard. Also, we would
15 address at that conference the issue of process for
16 examination. Your Honor, we talked about if someone could
17 take the lead. I think the parties will have a better idea
18 then of whether that's possible. We would also propose the
19 following if your Honor is amenable to it. It would be to
20 hear the motions in limine that have already been filed, and
21 in connection therewith I should have mentioned something I
22 failed to do, that the parties would agree to file their
23 responses to the motions in limine that are outstanding on
24 Tuesday, December 10th, if your Honor would be able to hear
25 those on the 13th.

1 We would also propose that if your Honor wanted to
2 do this -- I don't believe you did at the assumption -- I'm
3 sorry -- at the eligibility hearing, but the exhibit
4 objections -- it would be possible to deal with them then.
5 It might expedite things the next week, so we would propose
6 that and then also the issue of time limits on the parties'
7 cases. That's where I suggested, your Honor, that seven
8 hours for the city and eight hours for the objectors might be
9 reasonable, but that was -- would be a possible subject for
10 then.

11 And then moving to Monday, December 16th, I
12 mentioned the rebuttal witness deposition date, if necessary.
13 Oh, I'm sorry. One last thing. I keep forgetting about
14 December 10th. The reply briefs -- the city's reply brief in
15 support of the assumption motion would be due on December
16 10th as well as the city's response to the objections that we
17 will be receiving today on the DIP motion --

18 THE COURT: Okay.

19 MR. SHUMAKER: -- would also be on the December
20 10th. Sorry for going out of order there. And that would
21 leave us, your Honor, with the hearing on the 17th, 18th, and
22 19th, a consolidated hearing of both the assumption and DIP
23 motions.

24 THE COURT: That's certainly all fine with me. We
25 can reconvene here for your final pretrial conference

1 actually in this courtroom --

2 MR. SHUMAKER: Okay.

3 THE COURT: -- on the 13th.

4 MR. SHUMAKER: Wonderful.

5 THE COURT: We just need a time, Chris. Any idea?

6 THE CLERK: 10 a.m.

7 THE COURT: 10 a.m.?

8 MR. SHUMAKER: Wonderful.

9 THE COURT: Would anyone like to -- I'm sorry.

10 Something further, sir?

11 MR. SHUMAKER: One thing. I mentioned all that.

12 The one thing that was excluded in my rundown were issues
13 with Syncora, so these are the non-Syncora issues.

14 MR. MARRIOTT: Good afternoon, your Honor. Vince
15 Marriott, EEPK. Just one quick clarification. As I
16 understand it, the designation of rebuttal witnesses on the
17 12th is both the debtor and the objector's, and there's a
18 deadline of noon.

19 THE COURT: Noon on the 12th?

20 MR. MARRIOTT: Yes, yeah.

21 THE COURT: Yes. I think he said that.

22 MR. MARRIOTT: Yeah.

23 THE COURT: Yes.

24 MR. MARRIOTT: Yeah. Okay. That's it. Other than
25 that, I think it all got in.

1 THE COURT: All right. So you'll submit an order.
2 Is that the plan?

3 MR. SHUMAKER: Yes, your Honor.

4 THE COURT: Okay. So now what's left to resolve
5 with regard to Syncora or anything else?

6 MR. KIRPALANI: Your Honor, may I be heard on the
7 phone?

8 MR. SHUMAKER: Your Honor, the Syncora issue is --

9 MR. MARRIOTT: Sorry. Can I just make a quick
10 request?

11 THE COURT: Sir.

12 MR. MARRIOTT: I have a plane to catch. Can I -- I
13 have no dog in this fight. May I be excused?

14 THE COURT: Yes, sir.

15 MR. MARRIOTT: Thank you.

16 THE COURT: Yes.

17 MR. SHUMAKER: The remaining issue --

18 THE COURT: Let's just be clear. Who is on the
19 line, please?

20 MR. KIRPALANI: Again, your Honor, for the record,
21 it's Susheel Kirpalani from Quinn Emanuel in New York
22 representing Syncora in the New York state lawsuit that's now
23 been removed and transferred to the Eastern District of
24 Michigan and that pursuant to the automatic reference is
25 currently sitting and waiting to be docketed for further

1 proceedings or consideration before the Court.

2 THE COURT: Thank you.

3 MR. SHUMAKER: And, your Honor, on the -- the
4 remaining issues relating to Syncora relate to what I was
5 explaining before about the city's position on the motion to
6 intervene with regard to the adversary proceeding and the
7 almost briefed motion to dismiss. We have discussed it with
8 Syncora's counsel at the break. We have not been able to
9 come to agreement. What we would propose is in our papers,
10 which would be perhaps a -- if your Honor believes a hearing
11 is necessary -- frankly, on the city's motion to intervene,
12 we're not sure that a hearing would be necessary, but if your
13 Honor believes one is, sometime next week, when would be
14 convenient to your Honor, the 4th or the 5th or --

15 THE COURT: When did you file this motion?

16 MR. SHUMAKER: The motion to intervene, I believe,
17 was filed November 18th.

18 THE COURT: Has there been a response to it?

19 MR. SHUMAKER: There has. It is fully briefed.

20 THE COURT: Well, it's hard for me to give you an
21 answer to that without having actually looked at the papers,
22 so let me promise to get back to you as promptly as possible
23 on that and, if a hearing is necessary, to give you as prompt
24 a hearing as possible.

25 MR. SHUMAKER: And then the one remaining issue on

1 behalf of the city, your Honor, was the motion -- the motion
2 to dismiss, which right now is pending and awaits the swap
3 counterparties' reply, and if the city were to be allowed to
4 intervene, then the city would participate in that briefing.
5 We were thinking that if your Honor wanted to, we could have
6 a hearing that next week -- it would be the week of December
7 9th -- to argue that motion, which, again, we believe would
8 pare down the issues that would be taken up on the assumption
9 and DIP motion hearings the next week.

10 THE COURT: All right. Walk me through that in
11 little baby steps because I'm not sure I quite followed it
12 from your earlier presentation.

13 MR. SHUMAKER: Well, I'm sorry about that, your
14 Honor. The issue is if the city is allowed to intervene --
15 I'll boil this down to its essence, which is the swap
16 counterparties, which are currently the parties in that
17 lawsuit, have filed a motion to dismiss saying that Syncora
18 does not have the consent rights that it argues that it has,
19 the same consent rights that are at issue with regard to
20 Syncora's objection to the assumption motion. And what we
21 believe is -- as the swap counterparties believe, too, is
22 that that motion can be adjudicated by your Honor because it
23 is a matter of contract construction, contract
24 interpretation. It's the interplay of the different swap
25 agreements and the collateral agreement and the forbearance

1 agreement, and if your Honor was to hear that -- if the city
2 were to intervene but it was to hear that the week of the
3 9th, then that would take care of a lot of -- well, the
4 Syncora objection we believe would fall to the side.

5 Now, in connection with that, we would also, I
6 think, be proposing that your Honor issue proposed findings
7 of fact and conclusions of law because that's a part of the
8 adversary proceeding, but I don't know if that answers your
9 question, your Honor.

10 MR. KIRPALANI: Your Honor, if I could try and
11 clarify --

12 THE COURT: Yes. Go ahead, sir, please.

13 MR. KIRPALANI: Thank you so much, your Honor, and,
14 again, I apologize for appearing telephonically.

15 THE COURT: That's okay.

16 MR. KIRPALANI: This is Susheel Kirpalani from Quinn
17 Emanuel on behalf of Syncora. I just want to give your Honor
18 a macro sense of the issue. In July after your Honor
19 confirmed at the city's counsel's clarification that the
20 automatic stay does not apply to the swap counterparties but
21 only to the city, we filed a lawsuit in New York state court
22 against our counterparties, the banks. Thereafter, since
23 July, really nothing has happened other than procedural ping-
24 pong. The banks sought to remove the case to federal court
25 in New York. It was there for awhile. Finally, Judge Kaplan

1 in the Southern District decided to transfer the venue to the
2 District Court in Michigan without deciding whether the
3 federal court had jurisdiction over the lawsuit, which is, as
4 counsel just mentioned, a New York state contract dispute
5 between two nondebtor parties.

6 Before the District Court last week we appeared and
7 tried to address the issue of where is the right place for
8 this dispute to be heard. We made it clear to all the
9 parties as well as to the District Court that, consistent
10 with what Syncora's position has been before your Honor,
11 certain issues, while they may be related to the bankruptcy,
12 are noncore to the bankruptcy, and statutorily they are
13 required to be ordered and ruled upon and adjudicated by
14 either a state court or by an Article III federal District
15 Court. In the interest of nothing other than efficiency,
16 what we've tried to do with the city and with the banks is
17 come up with a solution where we stop the procedural ping-
18 pong, we try to do something that's efficient. We would
19 waive our right to try to seek the matter to be heard back
20 through mandatory abstention in New York state court, and we
21 would just have the matter adjudicated once in the District
22 Court. That was opposed, and the determination was pushed
23 back on us that Judge Rhodes needs to review the issues.
24 Your Honor, I haven't appeared before you in this matter, but
25 I've read your transcripts. I do believe that your Honor

1 previously thought of this issue and considered it to be one
2 of the many warts that may exist that if the forbearance
3 agreement were to be assumed, it would be a contract that's
4 assumed warts and all, and whatever the rights of nondebtor
5 parties are as between each other, they'll have to duke that
6 out in the right place at the right time.

7 Nevertheless, the city and the banks have tried, as
8 your Honor just heard, to kind of railroad the process and
9 push everything to be resolved before even the city has
10 properly intervened, before even the briefing is done, before
11 the plaintiff, Syncora, has an opportunity to file a motion
12 for summary judgment, which we've been waiting to file until
13 the matter would be docketed in some court. And we have
14 proposed in the interest of efficiency to not seek to
15 withdraw the reference, to ask your Honor to consider the
16 motions for summary judgment along with the motion to dismiss
17 so everything is done once and done properly on a proper
18 record with appropriate briefing, and then your Honor could
19 issue proposed findings and proposed conclusions of law for
20 the District Court to consider adjudication and issuing an
21 order. That was unacceptable to the city and to the banks,
22 and we -- I want to tell your Honor that we are trying to be
23 as efficient as possible. We've never even had a substantive
24 day in court since July on the issues of what our rights are
25 vis-a-vis the banks under a contract that was negotiated

1 seven years before this bankruptcy case, and we'll do
2 whatever your Honor pleases in terms of timing, scheduling.
3 The city has not even filed a proposed pleading in support of
4 its intervention. Frankly, we're not sure what they could
5 possibly say that our bank defendants have not already said,
6 but I'm not trying to stand on ceremony about those issues
7 either, but we do need due process. We do need an
8 opportunity to respond if they want to take a position with a
9 pleading, and we have the right, as we've said in other
10 proceedings, to have this matter adjudicated in an Article
11 III court or in a state court, but in the issue of -- in the
12 interest of efficiency, we're happy to have your Honor issue
13 proposed findings and conclusions of law and then have it
14 adjudicated by the District Court, and that's where we stand.
15 And in terms of the briefing, whatever works for your Honor
16 and your Honor's staff, which I'm sure is overburdened by
17 enough, we will live by.

18 MR. SHUMAKER: Your Honor, we -- counsel's
19 proposal -- Syncora's proposal is unacceptable to the city
20 because we do not believe that the matter is noncore. We
21 believe that it is core and that it goes to the extent of the
22 lien of the property of the debtor. And because of that, we
23 think that your Honor can, in fact, deal with this, and so
24 that's why -- I mean if we're able to brief up the -- okay.
25 We have no idea what additional facts Syncora is going to

1 allege because we believe this is purely an issue of contract
2 construction, but if there's a -- you know, a summary
3 judgment motion they're going to file in the next day or so,
4 we could get that briefed up, and we could argue that at the
5 first day of the hearing on the 17th because we think this
6 issue needs to be resolved once and for all for the city's
7 sake.

8 MR. KIRPALANI: Timingwise that's fine with us, your
9 Honor. It's an issue, again, now only of proposed findings
10 that your Honor could deliver at or, you know, after hearing
11 argument on December 17th. We're fine with the schedule.
12 The issue had to do with where it should be finally
13 adjudicated and what our rights are under the Constitution,
14 and that's what we tried to make clear to the city and to the
15 banks.

16 MR. SHUMAKER: Your Honor, Syncora could always
17 consent to your adjudicating this.

18 THE COURT: Well, we can't determine the issue of
19 core versus noncore right now; right? I don't have the
20 papers to try to figure that out, so we're going to have to
21 leave that issue open as well, and you'll have to brief it in
22 connection with some motion or another or maybe its own
23 motion. I don't know. The timing of these things is always
24 unfortunate, but I have to say that the process of trying to
25 get an issue as important as this one finally resolved within

1 the time frame that we have set for ourselves on approving
2 the DIP financing and the assumption motion feels very
3 rushed. And I'm normally all for efficiency and getting
4 things done, as you all know, but this one feels a little
5 over the line, so I'm going to -- I'm going to turn you down
6 and suggest that we process this in the normal course, so
7 we'll look at the motion to intervene in the next few days,
8 early next week, and decide whether we need a hearing on
9 that, but in connection with a motion to dismiss or motions
10 for summary judgment, we'll have to handle those in the
11 normal course.

12 MR. SHUMAKER: Okay. Thank you, your Honor.

13 THE COURT: All right.

14 MR. KIRPALANI: Thank you, your Honor.

15 THE COURT: You're welcome, and, yes, sir, you may.

16 MR. GROW: Thank you, your Honor. Stephen Grow,
17 Warner, Norcross & Judd. I represent the swap
18 counterparties, your Honor. I think there may be some
19 additional context that may be appropriate here, your Honor.
20 There is, in fact, with the exception of the counterparties'
21 reply, a fully briefed motion to dismiss that's been pending
22 for some time at the District Court level. Our thought was
23 that certainly --

24 THE COURT: Well, it's fully briefed unless the city
25 is permitted to intervene, in which case it's going to want

1 to brief it. Am I right about that?

2 MR. GROW: That's probably true, but I would expect,
3 your Honor, that our interests and arguments in that
4 respect -- with respect to the legal arguments are fairly
5 well-aligned with the city's on this point. You know, the
6 alternative is -- and I hear counsel for Syncora making the
7 point that they ought to be entitled to file a motion for
8 summary disposition that they've had on the shelf. They can
9 certainly do that. The Court, in the meantime, could
10 consider the motion to dismiss, and if the Court believed
11 that there was a basis to grant the motion to dismiss, it
12 would moot out the motion for summary disposition. And I
13 understand the due process issues. I understand that we're
14 moving at a very -- at a lightning clip here, and -- but it
15 seems to me that would be one way for -- to recognize
16 Syncora's due process concerns and at the same time give the
17 Court an opportunity to resolve this issue before the --

18 THE COURT: Well, fair enough, but if it's noncore,
19 which, like I say, I don't know, but if it is, nothing I do
20 would be final until a District Court reviews it anyway;
21 right?

22 MR. GROW: Understood; understood. It's difficult
23 because --

24 THE COURT: So there's that built-in inefficiency or
25 at least the potential for that built-in inefficiency

1 regardless.

2 MR. GROW: There is. There is. Now, I think --

3 THE COURT: So, you know, maybe the answer is for me
4 to try to get my arms around it enough to come to some
5 preliminary conclusion on whether it's core or noncore.
6 Where are the papers? Have they been filed with the
7 District -- with the Bankruptcy Court yet -- or you said
8 they're in limbo. Where are they?

9 MR. GROW: I believe the District Court case has
10 been referred to your Honor, but it hasn't been docketed yet.

11 THE COURT: Hasn't been opened up yet?

12 MR. GROW: Right. So I don't know whether there's a
13 paper file in transit. I don't know what that process is,
14 but it has not --

15 THE COURT: I don't either. Chris, can we try to
16 track that down at some point today?

17 THE CLERK: We haven't received it yet.

18 THE COURT: Oh, we haven't received it from District
19 Court yet. Which judge did you all say it was?

20 MR. GROW: Goldsmith.

21 THE COURT: All right. Maybe we'll contact their
22 chambers and see.

23 MR. GROW: My point, your Honor, was that this is
24 not something that has been sprung on Syncora. There have
25 been pending motions which --

1 THE COURT: Well, and I don't think they're
2 contending that it was, yeah. All right. Well, I think we
3 may just have to leave it open and let me get my arms further
4 around it and come up with a schedule that makes sense for
5 everybody. I wish we could, you know, pin it down a little
6 further today, but it's too far beyond my grasp at this
7 point.

8 MR. GROW: Understood, your Honor. Thank you.

9 MR. SHUMAKER: Your Honor, one suggestion. If your
10 Honor was to allow the city to intervene and the issue of
11 core versus noncore could be briefed in connection with the
12 reply briefs that have to be filed in connection with that
13 motion to dismiss by the swap counterparties and obviously
14 Syncora and the city.

15 THE COURT: When would those be due?

16 MR. SHUMAKER: Whenever you say, your Honor.

17 THE COURT: All right. Let's leave that open, and
18 then we'll figure it out.

19 MR. SHUMAKER: Thank you, your Honor.

20 THE COURT: All right. Are we done? All right.
21 When can I expect the procedures order?

22 MR. SHUMAKER: Your Honor, I was going to try to
23 circulate the draft on Monday and get it to you as quickly as
24 possible. Would that --

25 THE COURT: Okay. But in the meantime, you all are

1 going to operate as if it's in effect? Yes?

2 MR. SHUMAKER: Yes, your Honor.

3 THE COURT: Okay.

4 MR. SHUMAKER: Thank you, your Honor.

5 THE COURT: Thank you. We're in recess.

6 THE CLERK: All rise. Court is adjourned.

7 (Proceedings concluded at 1:27 p.m.)

INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

November 28, 2013

Lois Garrett

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846
MICHIGAN, .
 . Detroit, Michigan
 . December 13, 2013
Debtor. . 10:01 a.m.

HEARING RE. MOTION TO ADJOURN HEARING; MOTION TO COMPEL
THE PRODUCTION OF PRIVILEGE LOG; PRETRIAL CONFERENCE
BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Jones Day
By: ROBERT W. HAMILTON
325 John H McConnell Blvd., Suite 600
Columbus, OH 43215
(614) 469-3939

Jones Day
By: GREGORY M. SHUMAKER
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113
(202) 879-3679

For Syncora Kirkland & Ellis, LLP
Guarantee and By: STEPHEN HACKNEY
Syncora Capital 300 North LaSalle
Assurance: Chicago, IL 60654
(312) 862-2074

For Erste Ballard Spahr, LLP
Europaische By: VINCENT J. MARRIOTT, III
Pfandbrief-und 1735 Market Street, 51st Floor
Kommunalkreditbank Philadelphia, PA 19103-7599
Aktiengesellschaft (215) 864-8236
in Luxemburg, S.A.:

For UBS: Bingham McCutchen, LLP
By: JARED R. CLARK
399 Park Avenue
New York, NY 10022-4689
(212) 705-7770

APPEARANCES (continued):

For Detroit Retirement Systems- General Retirement System of Detroit, Police and Fire Retirement System of the City of Detroit: Clark Hill, PLC
By: JENNIFER GREEN
500 Woodward, Suite 3500
Detroit, MI 48226
(313) 965-8300

For David Sole: Jerome D. Goldberg, PLLC
By: JEROME GOLDBERG
2921 East Jefferson, Suite 205
Detroit, MI 48207
(313) 393-6001

For FGIC: Weil, Gotshal & Manges, LLP
By: KELLY DIBLASI
767 5th Avenue
New York, NY 10153
(212) 310-8032

For Ad Hoc COP Holders: Allard & Fish, PC
By: DEBORAH L. FISH
535 Griswold, Suite 2600
Detroit, MI 48226
(313) 961-6141

Court Recorder: Letrice Calloway
United States Bankruptcy Court
211 West Fort Street
21st Floor
Detroit, MI 48226-3211
(313) 234-0068

Transcribed By: Lois Garrett
1290 West Barnes Road
Leslie, MI 49251
(517) 676-5092

Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

1 THE CLERK: All rise. Court is in session. Please
2 be seated. Case Number 13-53846, City of Detroit, Michigan.

3 THE COURT: It appears we have an attorney swearing
4 in for this morning. Okay. Would you stand at the lectern,
5 please? And what is your name?

6 MS. DIBLASI: Kelly DiBlasi

7 THE COURT: Okay. Are you prepared to take the oath
8 of admission to the Bar of the Court?

9 MS. DIBLASI: Yes, I am.

10 THE COURT: Please raise your right hand. Do you
11 affirm that you will conduct yourself as an attorney and
12 counselor of this Court with integrity and respect for the
13 law, that you have read and will abide by the civility
14 principles approved by this Court, and that you will support
15 and defend the Constitution and laws of the United States?

16 MS. DIBLASI: I do.

17 THE COURT: Welcome.

18 MS. DIBLASI: Thank you.

19 THE COURT: We'll take care of your paperwork for
20 you. Okay. I think we should begin with Syncora's motion to
21 adjourn.

22 MR. HACKNEY: Good morning, your Honor. Stephen
23 Hackney on behalf of Syncora. Your Honor, we brought the
24 adjournment motion I would say for two broad reasons, and
25 then there are a couple discrete issues that are also

1 included in the motion, but the first broad reason was that
2 we previously had pretty significant colloquy with the Court
3 on November 14th, I believe, with respect to the interplay
4 between Section 364 and Section 904 as the Court is
5 considering whether to approve the post-petition financing.
6 And it came up in the context of our request for discovery
7 into the needs of the city for the money, the uses of the
8 quality of life proceeds, and how the anticipated uses will
9 relate to the interest of the city and the interest of
10 creditors in this case, and I think the Court may recall that
11 we had -- you had relatively extensive colloquy both with me
12 and with Ms. Connor and with Mr. Gordon. And at the
13 conclusion of that, what the Court had said was I'm not going
14 to grant the discovery today, but I invite you to return on
15 this issue at the hearing, and we can revisit it. And part
16 of the reason we tied that up for today, your Honor, was
17 because we were having this -- we teed it up for today is
18 because we were having this pretrial conference and we
19 thought it was appropriately considered in anticipation of
20 the hearing next week.

21 Your Honor, I think, in our view, there is the issue
22 of the standard and the issue of what you are entitled to
23 consider when you're deciding whether to grant the post-
24 petition financing is a bit of a predicate issue to how the
25 hearing should flow, and it's a predicate issue to the types

1 and the nature of the discovery that's been granted because I
2 think that the city has taken -- took in that hearing and has
3 taken the position that the Court is not entitled under
4 Section 904 to consider whether the city needs the money, how
5 it wants to use the money, and how those uses will impact the
6 interests of creditors as well as the interest of the city.
7 It has taken a narrower position, which is that the Court may
8 merely consider whether the city has sought to obtain
9 unsecured credit and, if it's unavailable, whether the
10 secured credit that it purports -- that it wants to borrow is
11 on the best terms that are available.

12 Depending on how you resolve that question I think
13 should have an impact on both whether you grant discovery to
14 the creditors of the type that we had previously requested
15 or, alternatively, whether you streamline that portion of the
16 post-petition financing hearing and say given that the city
17 has taken the position that I cannot consider these issues
18 under Section 904, the city has to have the courage of its
19 convictions and also not make a record detailing all of the
20 different challenges that the city faces and why the money
21 will be used to assuage those challenges because I think
22 there's a bit of a swinging door here, which is the city
23 wants to put on through Mr. Orr or Mr. Moore, the Conway
24 MacKenzie restructuring expert, the story of the City of
25 Detroit and the different challenges that it faces, and it

1 wants to introduce that evidence into the record in order to
2 persuade the Court to grant it the post-petition financing,
3 but it also at the same time is saying that you're actually
4 not entitled to review their decisions on that subject and
5 that you're not -- that you ought not to grant us discovery
6 that allows us to check the work of the city and its
7 consultants in reaching the conclusions and recommendations
8 that they've reached. So I think that is appropriately
9 addressed today, your Honor, and what I think that you had
10 said at the last hearing that we had before you was -- you
11 know, at that time I don't think we had even filed our
12 objection, so my sense of the hearing was that you were
13 saying, "My current view is that I'm not going to grant the
14 discovery, but I won't finally decide this issue and I'll
15 deny your request without prejudice to come back." It seems
16 appropriate to us for the Court to decide the issue now
17 because if we go through the hearing and in the course of the
18 hearing the Court decides, you know, I actually -- I've
19 decided that under 364 I do need to decide if this post-
20 petition financing is in the best interest of creditors, and
21 I do need to make an assessment of how this money is going to
22 be used, whether there are alternative noneconomic ways for
23 the city to address certain short-term needs, whether there
24 are other existing cash flows that it can use, and in order
25 to -- and the potential impact on creditor recovery. I need

1 to assess that. Well, I think then we will be in the middle
2 of a hearing where we will not have been given discovery into
3 those questions in a way that allows us to develop a
4 sufficient record.

5 Alternatively, if you decide today, no, I agree with
6 the city, and I'm not entitled under 904 to probe behind how
7 the city -- how the city intends to use the money that it
8 wants to borrow, my review is much more limited, then I
9 think, alteratively, that the Court should make that ruling
10 but also that the city should have the courage of its
11 convictions and that that portion of the post-petition
12 financing hearing should be presented in a way that's
13 consistent with its legal posture. This was the first -- and
14 I will tell you, your Honor, that to the extent the Court
15 wants to have argument on the standard under Section 364
16 versus 904, the individual who -- the individual attorney who
17 is preparing on those arguments for the hearing next week is
18 available and in the court today and will do a better job
19 than I will of getting deep into the weeds on some of the
20 different case law and so forth that we think informs the
21 standard, but we did think it was an important issue that was
22 worth bringing up today, and that is one of the first
23 motivations for our adjournment motion.

24 The second one, your Honor, was specific to the
25 forbearance agreement, and it flowed from the replies that

1 were filed both by the city and by the swap counterparties
2 because in those replies, those two parties made clear that
3 they aren't just seeking assumption of the motion -- of the
4 forbearance agreement, warts and all, for what it is worth
5 subject to the third-party claims. They are seeking the type
6 of broad relief that they outlined in the proposed order that
7 they submitted to you, and this is of concern to us because
8 you'll remember that the first time you and I had the
9 opportunity to meet one another was at a hearing back on
10 August 2nd right at the outset of the case where we had
11 sought discovery on the forbearance agreement, and the Court
12 in that hearing -- and I went back and reviewed the
13 transcript again last night -- I would say was relatively
14 clear about saying, look, let me assure you that when I
15 decide this, I decide it -- you know, it comes warts and all,
16 comes subject to all of the third-party claims that are
17 asserted by parties as a result of it, and that decision then
18 heavily informed the colloquy that you and I had about the
19 nature of discovery because you were saying, given the
20 limited role that I perform, why do you need all this
21 discovery, and you denied our initial request for --

22 THE COURT: You're focusing on the consent issue.

23 MR. HACKNEY: Well, I would say in terms of the
24 third-party rights, there is not only the consent issue but
25 also the argument that the swap counterparties cannot

1 transfer rights under the swap to third parties, that they
2 cannot modify or amend the swap or the collateral agreement
3 without consent, the fact that payments to the swap
4 counterparties under the forbearance agreement violate the
5 waterfall that's contained in the service contracts. The
6 forbearance agreement implicates all of those things or it
7 certainly does ab initio, and then it also does when you
8 perform under it in connection with the DIP. So I think that
9 the fact that the swap counterparties and the city are now
10 coming to the Court and saying, no, we want you to finally
11 determine these legal issues and we want the proposed order
12 that we submitted to you that says we can perform without
13 liability, no one else's consent is required -- you know,
14 when you and I were engaging in our dialogue back on August
15 2nd, the city did not at that point pop up and say, "Wait a
16 second, like we have a different view of what you can do
17 under Section 365 and Rule 9019. We don't agree that you
18 have this limited role. We think that you're going to decide
19 these issues." They didn't say that, and so they actually
20 said, yes, limited discovery is appropriate, but now we've
21 come to the end, and they stick the reply brief in that says,
22 no, you should decide all of these issues. So that was cause
23 for concern for us and was the second major motivating reason
24 in bringing the adjournment motion. Now, I do want to be up
25 front with the Court.

1 THE COURT: What does that have to do with an
2 adjournment?

3 MR. HACKNEY: Well, I guess what I would say is
4 this, which is it's similar to the concerns under Section 364
5 versus 904, which is we will not change our argument
6 regarding the nature of a 365 hearing or a 9019 hearing, but
7 if we're going to go into battle where there's a risk that
8 the Court may be deciding all of these issues, then our
9 position is if we're at risk that the Court may decide all
10 these issues, we need to depose, for example, the swap
11 counterparties.

12 THE COURT: Why?

13 MR. HACKNEY: Because they're all parties to this
14 transaction, and understanding --

15 THE COURT: But aren't those issues all to be
16 determined, if at all, based on the documents?

17 MR. HACKNEY: No, I don't think so. I don't think
18 so. I think that -- I don't think that you can say at this
19 point, oh, these are just pure legal questions. I think that
20 the way that they structure these documents, the substance of
21 the transaction, their intentions in structuring the
22 documents, not only are going to be relevant to your
23 consideration, but to the extent there are ambiguities, when
24 you have different parties going at it hammer and tong like
25 this on what the documents mean, there is a real potential

1 for the need for parol evidence.

2 THE COURT: Every time that the parties disagree
3 about what a document means, there's an ambiguity that opens
4 up discovery? Is that the --

5 MR. HACKNEY: Not necessarily.

6 THE COURT: Is that the law?

7 MR. HACKNEY: Well, I think the law is that where
8 the parties have advanced reasonable interpretations of the
9 documents, multiple reasonable interpretations --

10 THE COURT: Isn't it the Court's job to interpret
11 contracts as a matter of law?

12 MR. HACKNEY: In the proper context informed by the
13 proper procedures, and both Orion and Sportstuff are cases
14 that say the limited either assumption or 9019 context is not
15 a substitute for the trial on the merits. Those are quotes.
16 And now the city is trying to say, no, it should be --

17 THE COURT: Okay. But that's a different question
18 from opening up discovery to the extent you seek it. I don't
19 know if I agree with you or not on the question of whether
20 this is the right time to decide those issues, but it's a
21 long way from that to if it is, you need more discovery.

22 MR. HACKNEY: I think that you're right that they're
23 separate questions. I agree that you might --

24 THE COURT: I'm only asking about why you need
25 discovery, and I haven't heard it yet.

1 MR. HACKNEY: Well, I think the circumstances
2 regarding the negotiation of the forbearance agreement and
3 what the provisions mean and why they were structured in the
4 way they were structured and whether that structuring was
5 designed, for example, to evade consent rights, those are
6 factual determinations that I think could be validly before
7 the Court.

8 THE COURT: Suppose they were. So what?

9 MR. HACKNEY: That would be relevant evidence. It
10 would be relevant --

11 THE COURT: To what? To how to interpret the
12 contracts?

13 MR. HACKNEY: Absolutely. Absolutely, your Honor.
14 I don't think that -- I think --

15 THE COURT: You need to move on.

16 MR. HACKNEY: Okay. Well, your Honor, the
17 additional issues that are contained in the adjournment
18 motion are two. One of them relates to the privilege log and
19 our request for a privilege log.

20 THE COURT: And what's the relevance of that?

21 MR. HACKNEY: The relevance of that is this is with
22 respect to discovery that the city did agree to produce in
23 connection with the DIP hearing.

24 THE COURT: What's the relevance of it?

25 MR. HACKNEY: The relevance of it is that if the

1 information has not been validly withheld by a privilege, it
2 may be discoverable and, thus, relevant.

3 THE COURT: I'll just ask one more time. What's the
4 relevance of the privilege log?

5 MR. HACKNEY: The privilege log allows --

6 THE COURT: Suppose you look at the privilege log
7 and say, "Ah, that's not privileged. We want it," I would
8 ask what's the relevance of whatever it is you want?

9 MR. HACKNEY: You can't know until you see it, but
10 you know it's relevant because they agreed to produce
11 documents on this subject matter. If it's not reasonably
12 calculated to lead to the discovery of admissible evidence,
13 then it wouldn't be on the log.

14 THE COURT: What else?

15 MR. HACKNEY: The last issue, your Honor, is an
16 issue that relates to the mediation, and it is an issue that
17 has some importance, I think, to this hearing, but it's also
18 just a generally more important hearing to the case that I
19 wanted to raise with the Court. There have been
20 presentations that were made by the city's consultants that
21 existed prior to the mediation that were done under
22 confidentiality agreements, nondisclosure agreements, that
23 related to the way that you could use the information that
24 was provided in those presentations, and they relate to the
25 work that the consultants were doing. After the mediation

1 was ordered, the mediation I would say generally has taken
2 two forms where there are --

3 THE COURT: I don't want to hear anything about the
4 mediation.

5 MR. HACKNEY: I'm not going to get into the
6 substance of the mediation negotiations. I'm just
7 describing --

8 THE COURT: Why are you telling me anything about
9 the mediation?

10 MR. HACKNEY: Because it impacts the evidential
11 admissibility of evidence that's produced by the consultants
12 in the mediation despite the fact that the presentations that
13 are being --

14 THE COURT: Is the city asserting -- excuse me. Is
15 the city -- is the city offering evidence from the mediation?

16 MR. HACKNEY: It is not, but it is also saying that
17 none of the presentations that are being made by the
18 financial advisors can be used as evidence even under seal
19 and so on and so forth.

20 THE COURT: I agree with that.

21 MR. HACKNEY: We wanted to raise that issue now as a
22 point of concern.

23 THE COURT: You have a different position?

24 MR. HACKNEY: Yeah, because the presentations by the
25 financial advisors are -- I would describe them as in the way

1 of 2004-type information. They're not being done pursuant to
2 2004, but they are, "Hey, creditors, here's what's going on
3 with our efforts on the -- on blight or police or fire," and
4 then, yeah, separately there are negotiations, but the
5 presentations that are being made, as I understand it, are
6 the same type of presentations that were being made before
7 the mediation.

8 THE COURT: Oh, I see what you're saying.

9 MR. HACKNEY: So --

10 THE COURT: Okay. Well, all right. We'll have a
11 discussion about that.

12 MR. HACKNEY: The only reason it's relevant, your
13 Honor, is just because that is the basis for a lot of our
14 information about what's going on with the city, and so it
15 does interplay --

16 THE COURT: I'm inclined to agree with you that just
17 because information was presented in a mediation doesn't mean
18 that that information is not admissible --

19 MR. HACKNEY: And, look --

20 THE COURT: -- if it's otherwise admissible.

21 MR. HACKNEY: Right. And one thing I want to --

22 THE COURT: It doesn't get shielded from our court
23 process just because it was presented in mediation.

24 MR. HACKNEY: Right. And -- I agree, and I want to
25 tell you that I'm not trying to evade the other parts of the

1 mediation where you may want the broader protections of there
2 won't be any evidential admissibility because you want people
3 to be candid in back and forth. I'm just saying given the
4 way this has gone together, can't we have like a little bit
5 of a switch that we flip where we say this is an FA
6 presentation about blight, this is a negotiation. Okay. And
7 let's flip the switch so that we can say, okay, well these
8 decks that they're putting forward that provide this level of
9 detail, that's subject to the NDA protections because that's
10 how it was -- the same presentation could have been made
11 before the mediation, and that's how it would have been
12 handled. The only reason I'm raising that, your Honor, is it
13 came up in one of the depositions when I was using two
14 documents, and we ultimately got past that issue with respect
15 to those two documents, but the city then at that point
16 asserted, hey, these two documents --

17 THE COURT: This may be -- this may be something we
18 have to deal with in the context of specific witnesses and
19 specific documents, but --

20 MR. HACKNEY: I think that's fine. I agree with
21 you, your Honor. I just want to --

22 THE COURT: If the question is did you say in
23 mediation A, B, and C, I don't like that --

24 MR. HACKNEY: Yeah.

25 THE COURT: -- but if the question is are A, B, and

1 C true, that's a different question. There's nothing
2 objectionable about that assuming A, B, and C are otherwise
3 relevant.

4 MR. HACKNEY: Okay.

5 THE COURT: All right. Anything further?

6 MR. HACKNEY: I don't think so. Thank you, your
7 Honor.

8 THE COURT: Anyone else want to speak in favor of an
9 adjournment?

10 MR. MARRIOTT: Good morning, your Honor. At the
11 risk of being a glutton for punishment, Vince Marriott,
12 Ballard Spahr, EEPK and affiliates. We also support
13 adjournment on the basis that Mr. Hackney has indicated.
14 Syncora has asked for it. We believe that the production of
15 documents and the witnesses presented by the city were based
16 on the city's view of what we were entitled to based on the
17 city's view of what this Court is entitled to make a decision
18 on or not. As and to the extent -- it's our view that this
19 Court is entitled to make a much broader inquiry and findings
20 than the city has suggested, and the discovery that has
21 proceeded to date is based on their narrow gatekeeping view
22 of what this Court is entitled to. And if this Court does
23 not agree with that narrow view, there's more discovery that
24 we'll need.

25 As to the forbearance agreement piece, let me just

1 make two quick observations. One is that as and to the
2 extent contracts are ambiguous, then I believe that parties
3 are entitled to and the Court needs to hear parol evidence
4 based upon intent, negotiations, and the like.

5 And, second, your Honor, as and to the extent that
6 the city and the swap counterparties are taking the view that
7 third-party rights under those contracts need to be
8 determined in the context of assumption of the forbearance
9 agreement and as and to the extent, therefore, that such
10 assumption and settlement embodied in it will affect third-
11 party rights via those findings by this Court, then I think
12 third parties are entitled to discovery around those issues.

13 THE COURT: Around what?

14 MR. MARRIOTT: Around --

15 THE COURT: I ask that because every settlement in
16 bankruptcy affects third parties.

17 MR. MARRIOTT: Yes, and that effect has to be -- if
18 it affects third parties, your Honor, affects third-party
19 rights, has to be fair, and I think fairness goes to an
20 inquiry into, well, what do the documents actually say, what
21 was intended by the parties at the time that these documents
22 were entered into. They are ambiguous. There has been a
23 great deal of dispute about what various provisions in very
24 complicated documents mean.

25 THE COURT: So you agree with the city and the swap

1 counterparties that these issues should be determined now
2 unlike Syncora?

3 MR. MARRIOTT: I'm not saying I agree that it should
4 be. If this Court were to stick to its statement in August
5 that third-party rights would flow through entirely
6 unaffected, then that would be fine, and we wouldn't need any
7 additional discovery.

8 THE COURT: Oh, all right.

9 MR. MARRIOTT: If, however, this Court adopts the
10 city, swap counterparty view that these are issues that now
11 are before it, that would require, in our view, additional
12 discovery.

13 THE COURT: Thank you. Anyone else want to speak in
14 favor of adjournment? Okay. Would the city like to be heard
15 on this matter?

16 MR. HAMILTON: Yes, your Honor. Good morning, your
17 Honor. Robert Hamilton of Jones Day on behalf of the City of
18 Detroit. If I can take the matters that were raised by
19 counsel for Syncora in reverse order, since the ones at the
20 end are the easiest to resolve, on the mediation issue that
21 Mr. Hackney raised, there is no dispute among the parties,
22 and we were able to work out what arose during the
23 deposition. Everybody agrees, as far as I can tell, with the
24 rules and the protocol that your Honor articulated in the
25 colloquy with Mr. Hackney. Our point at the deposition is if

1 you're going -- that we made at the deposition is if you're
2 going to whip out a document that was shared only at a
3 mediation, you ought to talk with us first to see if we have
4 a problem about that because maybe it would reveal something
5 that was confidential that we didn't want disclosed to the
6 outside world, but with the particular document that counsel
7 did whip out at the deposition, we determined that that was
8 the type of document that, as your Honor described, is
9 information that should be made public even though it was
10 initially distributed in the mediation, and we did make it
11 public and put it in the data room. So, as far as I can
12 tell, we're engaged at this point in a purely hypothetical
13 discussion about maybe there might be some other documents
14 that were shared in the mediation that we might want to use
15 at trial, but as we're going to get to the status conference
16 later today, everybody is going to share their exhibits.
17 We're all going to decide in advance what's relevant, what
18 isn't, or if we have an objection, so we're not going to have
19 this mediation issue arise at all. So I don't understand and
20 I certainly don't think there is any basis to adjourn the
21 hearing so that we can somehow decide in advance whether or
22 not there's additional information that was shared in
23 mediation that might be a problem at the hearing because that
24 issue is never going to arise.

25 On the privilege log, there was some ambiguity in

1 the request that we received 12 days ago from Syncora about
2 what type of privilege log they wanted, whether they wanted a
3 particular document-by-document description of every document
4 we withheld on privilege grounds or whether instead they
5 wanted some category basis of a privilege log. When counsel
6 for Syncora contacted me about 13 days ago or 12 days ago
7 about that issue, I indicated that we did not understand your
8 Honor's ruling on November 14th to require us to prepare and
9 produce a privilege log, but we were willing to discuss it,
10 and I wanted to -- I invited him to call me to tell me
11 whether or not a general category one would be sufficient
12 given the ambiguity in his original request. Counsel chose
13 not to take my invitation to call me and instead just filed
14 the motion to compel.

15 We are willing to do whatever the Court wants us to
16 do as regard to a privilege log. We've been working on it
17 for the past 12 days. And if the Court wants us to produce a
18 general category privilege log, we can do that by Monday. If
19 you want us to produce a document-by-document description of
20 every document withheld on privilege grounds, we can do that
21 by Monday, but it's certainly no reason to adjourn the
22 hearing. I don't think it is materially enough in this
23 context of a summary proceeding that they even need the
24 privilege log, but if your Honor believes it's sufficiently
25 material to order it, we can get it done by Monday on

1 whatever basis the Court or Syncora requests.

2 With respect to the forbearance agreement and the
3 request for additional discovery with respect to the
4 forbearance agreement and the assumption motion to assume it,
5 the City of Detroit contests Syncora counsel's suggestion
6 that our position has changed in any way from when this Court
7 already ruled on these arguments back in August. To the
8 extent there is some -- it is certainly the position of the
9 City of Detroit consistent with how the Court articulated it
10 that to the extent the Court needs to make rulings with
11 respect to the construction of particular contract
12 provisions, it can do so as a matter of law, to the extent it
13 needs to do so, in ruling on the 9019 motion for a compromise
14 of the parties' rights underneath those contracts. To the
15 extent the Court determines that there might be some
16 evidentiary issues involved if you were to have a full-blown
17 trial on those contracts, as we articulated, I believe, back
18 in August, in the context of a 9019 motion, you don't conduct
19 a mini-trial or an evidentiary ruling on those legal issues.
20 You consider those issues in deciding whether or not the
21 compromise is fair and equitable or is appropriate under the
22 standards for approving a 9019 compromise.

23 To the extent this Court were to determine, based on
24 the evidentiary record and arguments that are made at the
25 assumption hearing, that for whatever reason it cannot rule

1 on the merits of the 9019 motion unless it makes a factual
2 finding on a particular ambiguity and a particular document
3 and it is barred from making that finding because adequate
4 discovery hasn't happened yet, then the Court can decide at
5 that time whether it needs to allow that discovery to occur,
6 but there is no reason to adjourn this hearing now because
7 there's no reason to believe that such a necessary factual
8 finding is going to arise.

9 The bottom line is this Court already dealt with
10 this issue back in August, and nothing has changed, so
11 there's no reason two days -- two business days before the
12 hearing is about to start to adjourn it based on the issues
13 that this Court already decided back in August.

14 Now, with respect to the DIP and the 364 versus 904
15 issue that Mr. Hackney described, the City of Detroit has
16 gone to great lengths to provide discovery and an evidentiary
17 record to accommodate whatever ruling this Court makes as to
18 what the scope of -- the proper appropriate scope of review
19 is with respect to a request for 364(c) relief in a Chapter 9
20 case. We have set forth in our reply -- in our motion and in
21 our reply brief what our views are as to what the appropriate
22 legal standards are for this Court's review of our request
23 for relief under 364(c) to get the DIP by granting
24 superpriority administrative status in certain liens.
25 However, we have done whatever we can do to accommodate any

1 ruling this Court may make that says the scope of review is
2 broader than what we've laid out in our brief, and counsel
3 for Syncora is not correct to say that we have refused to
4 provide discovery on any of the broader issues that we say in
5 our reply brief are not within the appropriate scope of
6 review under the law. We have given all the information we
7 have on the need for borrowing this money, even though we
8 believe that, given the legislative history of the 1976-77
9 amendments to Chapter 9 with respect to 364 and the fact that
10 364(b) doesn't apply and the idea that the city should have
11 the same right to borrow unfettered by Bankruptcy Court
12 involvement in bankruptcy that it has outside of bankruptcy,
13 we believe that the need to borrow or the decision to borrow
14 money to fund city services is a decision that is committed
15 at the sole discretion of the City of Detroit and is not
16 subject to Bankruptcy Court review under both 904 and the
17 Supreme Court's decision in Bekins.

18 THE COURT: How would you articulate in one sentence
19 what the Court's role is on your 364 motion?

20 MR. HAMILTON: I would -- it is to the extent the
21 City of Detroit wishes to use special powers that are given
22 to it in bankruptcy that it doesn't have outside of
23 bankruptcy to borrow money, the Bankruptcy Court reviews
24 whether or not the use of those special powers is
25 appropriate. The ability to borrow money is not a special

1 power.

2 THE COURT: Those powers are the superpriority and
3 the administrative expense priority?

4 MR. HAMILTON: And the finding of good faith under
5 364(e). Those three things give --

6 THE COURT: Is appropriate?

7 MR. HAMILTON: Is appropriate for you to review
8 whether or not it is appropriate to allow the City of Detroit
9 to use those special powers to borrow money, and in that
10 context --

11 THE COURT: Is appropriate?

12 MR. HAMILTON: Well, whether the -- for instance,
13 if -- it would be -- you cannot -- we would have to convince
14 your Honor at the hearing that the City of Detroit cannot go
15 get the financing that we have determined we need without
16 offering those -- without offering the superpriority status
17 or the liens, which is typical in a 364(c) hearing anyway,
18 and we would also have to establish that the terms on which
19 we are offering those liens in super -- in a sort of super
20 administrative priority status, the terms on which we are
21 offering them are reasonable. That would be relevant both to
22 the use of those powers and to a finding of good faith under
23 364(e), but the decision whether to borrow the money in order
24 to fund quality of life's or any city services is a
25 decision -- is a political decision that, as we've

1 articulated in the reply brief, is one we don't think is
2 within your scope of review. However, we have provided full
3 discovery on that. We've given them everything we have on
4 how we decided how much we needed to borrow, why we needed to
5 borrow it, and the time --

6 THE COURT: When you say "reasonable terms," you
7 mean -- well, let me just ask. What do you mean?

8 MR. HAMILTON: Like whether the commitment fee,
9 interest rates are within market -- are within market --

10 THE COURT: Market standards?

11 MR. HAMILTON: Yeah. We need to establish in order
12 to get a finding under 364(e) that this was the result of
13 arm's length bargaining, good faith, and the terms are
14 reasonable.

15 THE COURT: I ask you what you mean by "reasonable"
16 because certain of the objections can be read to suggest that
17 the terms aren't reasonable given what you want to do with
18 the money.

19 MR. HAMILTON: Right. And the problem with that is
20 that goes into the political decision of whether you should
21 be borrowing money to fund city services, and our position,
22 as we lay out in the reply brief, is under 904 and Bekins,
23 that's not an appropriate review for this Court to do, but
24 the point I'm trying to make here is if you decide that --
25 notwithstanding our best effort to be eloquent, that you

1 don't agree with us, we have provided full discovery to the
2 objectors on what information we have as to why we think we
3 need to borrow this money and how much. That essentially
4 comes down to brass tacks, the cash flow projections prepared
5 by E&Y, which we've provided.

6 THE COURT: What's the standard of review on the
7 assumption motion?

8 MR. HAMILTON: I believe that's pretty much
9 straightforward 9019 standard, whether it falls below the
10 lowest level of reasonableness, I believe. I don't think
11 that's a --

12 THE COURT: Okay.

13 MR. HAMILTON: -- novel area of law.

14 THE COURT: How close can you pin down how much of
15 the DIP loan you're going to use to pay off the swaps?

16 MR. HAMILTON: That will be the subject of testimony
17 at the hearing, and it is my understanding that that amount
18 fluctuates -- I don't know -- I think perhaps even on a daily
19 basis based on interest rates, so we'll give you the most
20 current estimate at the time of --

21 THE COURT: But what is it?

22 MR. HAMILTON: -- the assumption hearing, and
23 whatever is left over is then the quality of life proceeds.

24 THE COURT: What's the number?

25 MR. HAMILTON: I don't know what the current number

1 is, your Honor.

2 THE COURT: Approximately.

3 MR. HAMILTON: It was the subject of deposition
4 testimony.

5 THE COURT: Approximately. Are we talking 200
6 million or 300 million or what?

7 MR. HAMILTON: I think it's closer to 230.

8 THE COURT: Within \$25 million, what's the number?

9 MR. HAMILTON: 230 million.

10 THE COURT: Okay. Is it the Court's role to
11 determine whether 230 million or whatever the number is is a
12 fair number?

13 MR. HAMILTON: I'm not sure what you mean by -- oh,
14 in terms of the compromise? It is the Court's role --

15 THE COURT: In terms of the buy-out of the swaps.

16 MR. HAMILTON: It is the -- I believe it is the
17 Court's role to determine whether or not the city's decision
18 to make that payment falls within the reasonable range of
19 possible outcomes if --

20 THE COURT: Okay.

21 MR. HAMILTON: -- the underlying legal issues were
22 litigated, and so fairness in that context is defined by as
23 long as it falls within the range of reasonable outcomes,
24 it's fair. If that's what you mean by "fair," then, yes,
25 that's within your role.

1 THE COURT: What impact would a negative decision by
2 this Court on that question on the assumption motion have on
3 the DIP motion?

4 MR. HAMILTON: It is a condition to closing on the
5 DIP that the parties be able to -- be able to perform under
6 the termination -- under the forbearance agreement. If you
7 don't approve the forbearance agreement, there's no DIP. It
8 won't close.

9 THE COURT: Okay.

10 MR. HAMILTON: And that was confirmed in depositions
11 last week.

12 THE COURT: Okay.

13 MR. HAMILTON: The only thing the city has not
14 agreed to provide in discovery is the vast multitude of
15 underlying communications that undoubtedly occurred in
16 connection with the elaborate work that Conway MacKenzie and
17 others have done in determining which restructuring
18 initiatives should be pursued, how much was needed for
19 particular restructuring initiatives, and when the money
20 should be spent and how. We have produced the end product
21 of all that work in detail updated through the middle of
22 November. We have allowed them to depose a full day Mr.
23 Moore on how those determinations were made, what standards
24 were used, but we haven't produced all the e-mails that may
25 have occurred between the various people at Conway MacKenzie

1 or the other outside consultants with the people at the city,
2 at the fire department, the police chief, the police people,
3 that they've done for the past year in determining how many
4 vests need to be bought, how many new cruisers they need,
5 what needs to be done in order to get police response times
6 down to a national average. All those e-mail communications
7 we have not undertaken to collect and review and produce
8 because, quite frankly, the burden would be astronomical, and
9 to the extent this Court were to undertake a review of each
10 of the individual decisions that the City of Detroit has
11 undertaken over the past year to determine what restructuring
12 initiatives they want to pursue at this point, that type of
13 hearing would take weeks, if not months, and we think no
14 matter how you decide what the appropriate scope of review is
15 under 364(c), there is no scenario where you will find that
16 it is appropriate for the Bankruptcy Court to sit in judgment
17 on those individual decisions about how many cruisers the
18 City of Detroit should buy or what -- or how the police --
19 how the bulletproof vests -- how many needed to buy, those
20 type of decisions, and you don't -- they don't need to see
21 all the e-mail communications on those type of issues, but
22 everything else we've provided discovery. We don't think
23 it's relevant, but if you decide that you need to hear it and
24 it is relevant, they've got discovery, and we've got
25 witnesses available, and you can hear the -- you can hear the

1 evidence. We'll accommodate whatever ruling you make as to
2 what the scope is of the evidentiary record you need in order
3 to consider our request for relief under 364(c). On that
4 basis, we don't think there's any justification for
5 adjourning a hearing that has been scheduled, that
6 everybody's been working at breakneck speed to be able to be
7 in a position to present to you starting Tuesday of next
8 week.

9 THE COURT: Anyone else want to speak against an
10 adjournment?

11 MR. CLARK: Your Honor, Jared Clark, Bingham
12 McCutchen, counsel to UBS. I'll speak very briefly just on
13 one issue that counsel for Syncora raised. Syncora has
14 argued since after the August 2nd hearing in its objection on
15 the assumption motion that an exercise of the city's option
16 under the forbearance agreement is void ab initio and of no
17 force and effect, and, therefore, your Honor need -- should
18 not approve the forbearance agreement, and this is based on
19 what I believe your Honor referred to as the consent right
20 issues. The swap counterparties believe that your Honor can
21 and needs to look at the consent right issues as a matter of
22 contract interpretation, as indicated; however, we do not
23 believe that that supports any need for an adjournment.

24 THE COURT: All right. Thank you. Anyone else have
25 anything further? All right. The Court will take this under

1 advisement until 11 o'clock and give you a decision at that
2 time.

3 THE CLERK: All rise. Court is in recess.

4 (Recess at 10:42 a.m. until 11:17 a.m.)

5 THE CLERK: All rise. Court is in session. Please
6 be seated. Recalling Case Number 13-53846, City of Detroit,
7 Michigan.

8 THE COURT: Counsel are present. I do have a
9 question for the city before I give a ruling.

10 MR. HAMILTON: Robert Hamilton of Jones Day on
11 behalf of the City of Detroit, your Honor.

12 THE COURT: Of course, I said "a question," but I
13 exaggerated. It's more than one. Is it the city's position
14 that the issue of whether Syncora -- Syncora's consent to the
15 forbearance agreement is -- or was required is an issue that
16 the Court must determine in connection with this approval
17 motion under 9019?

18 MR. HAMILTON: May I have a moment, your Honor, to
19 confer? Your Honor, as we have articulated in our reply
20 brief, it is our position that the Court has to determine
21 that the contract we are trying to assume is a valid
22 contract. In order to make the finding that the contract
23 we're asking to assume is a valid contract, you have to make
24 a determination on that issue.

25 THE COURT: So you agree with Syncora on that?

1 MR. HAMILTON: I don't -- I think we took the
2 position that Syncora said the same thing in one of their
3 earlier pleadings. I'm not sure if they've been consistent
4 in that regard, but to the extent that they take that
5 position, we agree with them.

6 THE COURT: Okay. Well, then there was just the one
7 question. Thank you. All right. The matter is before the
8 Court on the motion of Syncora --

9 MS. GREEN: Your Honor, if I may, something came up
10 at the break relating to discovery. We have a third-party
11 witness on our may call list named Thomas Gavin, and we were
12 planning to depose him Monday morning to make him available
13 for the city if they had questions for him. The city has
14 just stated it will object to third-party discovery because
15 they had not previously agreed to third-party discovery. I
16 just wanted to --

17 THE COURT: What does the phrase "third-party
18 discovery" mean?

19 MS. GREEN: That he's not a party. He used to be a
20 financial advisor for the City of Detroit. He no longer is
21 a -- is not currently a financial advisor for the City of
22 Detroit.

23 We wanted to depose him Monday and call him as a
24 witness at the evidentiary hearing. I wanted to confirm with
25 the Court that that was appropriate to deal with any

1 objections. I don't want to call him as a witness at the
2 evidentiary hearing and have some sort of objection to him by
3 the city.

4 THE COURT: Let me suggest this. I've been advised
5 you didn't put your appearance on the record.

6 MS. GREEN: I'm sorry. Jennifer Green on behalf of
7 the Retirement Systems for the City of Detroit.

8 THE COURT: Let me suggest this to you to resolve
9 your question. In connection with the motion to adjourn, I'm
10 going to articulate as best I can the issues as I see them,
11 and then you can consult among yourselves and see if the
12 testimony of this witness that you want to proffer would be
13 relevant given that these are the issues.

14 MS. GREEN: Okay. And I believe he would be
15 relevant --

16 THE COURT: So let me ask you to stand by on that
17 one.

18 MS. GREEN: I think he would be relevant to the
19 business judgment of the city in entering into the
20 forbearance agreement. That's what we would be proffering
21 the witness for. He has testimony that the swap
22 counterparties themselves had concerns about the pledge of
23 the casino revenue back in 2009. He was a financial advisor
24 on behalf of the city, and he worked with the city during the
25 collateral agreement execution.

1 THE COURT: Okay. But to that I would ask you what
2 is the relevance of the fact that the swap parties had
3 concerns?

4 MS. GREEN: To the extent that both the city and/or
5 the swap counterparties had concerns about the pledge of the
6 casino revenue and the collateral agreement itself and
7 certain objecting parties are arguing that the collateral
8 agreement is invalid or that the casino revenue pledged does
9 not survive the bankruptcy petition, if the city and the swap
10 counterparties also were aware of these potential issues, I
11 think that informs the city's business judgment in entering
12 into the forbearance agreement, your Honor.

13 THE COURT: How, though?

14 MS. GREEN: If there were issues that they should
15 have litigated, that is one of the arguments by some of the
16 objecting parties.

17 THE COURT: Okay. But we can look at that question
18 without having a witness tell us that Syncora or the swap
19 counterparties were concerned about it at the time; right?

20 MS. GREEN: Well, I assume, your Honor, if I expect
21 an objection --

22 THE COURT: Look, an issue is an issue whether the
23 parties knew about it at the time or not.

24 MS. GREEN: Well, if they knew about it then and
25 they knew about it at the time that the forbearance agreement

1 was being negotiated, it seems to me as though it's
2 questionable to enter into the forbearance agreement if you
3 knew you had very strong legal arguments that could have
4 been --

5 THE COURT: Ah, but the strength of the legal
6 arguments doesn't depend on whether the parties were aware of
7 those legal arguments at the time, does it, or does it?

8 MS. GREEN: I believe it does. If you --

9 THE COURT: Why?

10 MS. GREEN: -- enter into a forbearance agreement
11 and the argument from some of the objecting parties is that
12 you should have litigated it rather than settle it, then to
13 me it seems as though the knowledge of the city and the swap
14 counterparties as to the strength of their legal arguments or
15 the existence of certain arguments are admissions as to the
16 strength of those arguments.

17 THE COURT: Are what? Admissions?

18 MS. GREEN: Could be admissions as to the strength
19 or the existence of certain arguments that could have been
20 made or defenses that existed.

21 THE COURT: Well, but we would evaluate the strength
22 based on the applicable law and if there's conflicts in the
23 law, et cetera, et cetera. All right.

24 MS. GREEN: Thank you, your Honor.

25 THE COURT: All right. First, on the motion to

1 adjourn, this motion suggests to the Court that it's in the
2 best interest of all concerned and to facilitate resolution
3 of the motion itself for the Court to identify, as best it
4 can, what the issues are for next week's hearing, so I'm
5 going to attempt that.

6 The motion to assume the forbearance agreement under
7 Section 365, the city at least recognizes, and I believe
8 other parties do as well, that it's as much a motion for
9 approval of a settlement under Rule 9019 as it is a motion to
10 assume an executory contract. I just do not believe that the
11 fact that this agreement was reached a few days before the
12 bankruptcy as opposed to a few days after the bankruptcy
13 should make any substantive difference in either the outcome
14 or the nature of the Court's consideration in determining the
15 outcome.

16 As a general matter, I think the parties agree that
17 when considering a motion to approve a settlement, the
18 Court's role is to determine whether that settlement is fair
19 and equitable and whether it's in the best interest of the
20 estate as a whole. Accordingly, what is not relevant is
21 whether the settlement prejudices creditors or any particular
22 creditor because every settlement that's proposed to the
23 Court arguably prejudices one or more or even all creditors.
24 The question will remain whether the settlement is fair and
25 equitable and in the best interest of the estate.

1 In determining that question, the Court concludes
2 that the following factors in the context of this case are
3 significant. The forbearance agreement is clearly an attempt
4 by the parties to it to settle and resolve on a going forward
5 basis the legal and economic issues that they faced at the
6 time, so, accordingly, the probability of success that the
7 city might have if it pursued any challenge to the rights of
8 the other parties or to its own obligations as they existed
9 at that time is a major consideration. More on this in a
10 moment.

11 A second major consideration is the issue of
12 collection. Now, when the claim to be compromised is a claim
13 that the debtor has against a third party, of course, it's
14 that third party's collectibility that is an issue. On the
15 other hand, when the claim to be compromised is a third
16 party's claim against the city or the debtor more generally,
17 of course, the collectibility of the debtor is an issue. And
18 in the context of this case, the Court concludes that that is
19 an issue to be considered in determining this motion. At the
20 same time, the Court recognizes that on this issue of
21 collectibility it is asserted that the issue is a minimal
22 issue because of the security interests that are claimed
23 here, but if there are potential challenges to the validity
24 of those security interests, those would obviously come into
25 play in determining whether to grant this motion or not.

1 A third consideration is the complexity of the
2 litigation, although more specifically considering the
3 complexity of the litigation is only important because it
4 bears upon the costs to the city of litigating it if there is
5 no settlement or no settlement is approved and the delay to
6 the process, which leads really to the fourth consideration,
7 which is the interest of creditors. The issue here would be
8 what impact would granting the motion or denying the motion
9 have on the plan process, upon the city's and the public's
10 interest in the city's reconstruction and revitalization.

11 Those are the factors that the Court considers
12 important in determining whether this settlement is fair and
13 equitable and in the best interest of the city and its
14 creditors and its residents, but I want to -- I want to drop
15 a significant asterisk or footnote here. In considering the
16 probability of success on any of the issues that are
17 compromised by this proposed settlement, it is clearly not
18 the Court's role to resolve those issues, and the Court will
19 not resolve any of those issues.

20 A motion to compromise puts its proponent in a very
21 awkward position, and you can see that awkwardness in the
22 city's papers here because at the same time it is
23 acknowledging the strengths of the other parties' positions
24 or the weaknesses of its own positions, it dare not be too
25 articulate about either side of that lest the motion be

1 denied and it has to actually litigate those issues, so in
2 the context of this motion, the Court is not interested in
3 any evidence about what Jones Day or Mr. Orr or any of its
4 employees or agents thought were the strengths or weaknesses
5 of any challenges it might have to the other parties'
6 positions in this matter or with regard to any of the
7 positions that those other parties might take against the
8 city. The parties' papers have identified what those
9 challenges are on both sides, and it's for the Court, with
10 the assistance of counsel, surely, to try to evaluate as best
11 it can but in a summary way the strengths and weaknesses of
12 those challenges.

13 So, for example, and acknowledging this violation of
14 the general rule against giving an advisory opinion, it would
15 be inappropriate to ask Mr. Orr what he thought the city's
16 probability of success was in asserting issue "X" not only
17 because that would plainly require him to disclose his
18 communications with his counsel that are protected, but, more
19 importantly, and with all due respect to him, the Court isn't
20 actually that interested in what his assessment of the city's
21 probability on issue "X" is.

22 Now, it appears to the Court that most of the
23 underlying disputes between the parties that this agreement
24 compromises are, frankly, issues of contract interpretation
25 that would, in the ordinary course, be resolved by the Court

1 without evidence as a matter of law. It is certainly not the
2 law that simply because parties disagree about contract
3 interpretation, it's, therefore, ambiguous and under the
4 parol evidence rule subject to the testimony of witnesses.
5 And on this point, the Court will go one step further and
6 conclude that after reading all of the parties' briefs, the
7 Court does not identify a single issue of contract
8 interpretation as to which there is such ambiguity as would
9 permit a party to present parol evidence in support of its
10 interpretation.

11 Now, this does not mean that there is not a genuine
12 good faith dispute about the interpretation of the contract.
13 It appears to the Court there is, but that does not mean that
14 the contract is ambiguous. There are, however, certain
15 defenses that the city might have that may turn on the
16 establishment of certain facts, so, for example, I think one
17 of the parties, perhaps Mr. Sole -- correct me if I'm
18 wrong -- asserted that the city might have an equitable
19 subordination argument here. It would be the purpose and
20 function of this hearing not to try that case, not to call
21 witnesses in support of a claim the city has that some claim
22 or another of a given party should be equitably subordinated,
23 but still there should be some testimony by someone or some
24 evidence somewhere of what the factual predicate in a summary
25 way of such a claim might be.

1 All right. I think that's as much as I want to say
2 about the 9019, 365 motion.

3 On the debtor in possession financing motion under
4 Section 364, the Court basically agrees with the city's
5 position that Section 904 of the Bankruptcy Code prohibits
6 any review of what the city proposes to do with the proceeds
7 of the loan and actually prohibits any review beyond the
8 narrow review that Section 364 itself requires to determine
9 the reasonableness of the terms of the borrowing given the
10 current market conditions for similar kinds of loans and the
11 other technical requirements of Section 364, including the
12 city's inability to obtain a loan on any better terms. And,
13 of course, the Court welcomes any evidence on the issue of
14 whether the debtor in possession financing was negotiated in
15 good faith, but the city's proposed use of the proceeds is
16 not a matter for this Court's consideration next week.

17 Having concluded all of that, the Court must
18 conclude that the record fails to establish cause for any
19 adjournment. Accordingly, it is denied.

20 Now, can we move to the final pretrial conference on
21 this? Did you all prepare a joint pretrial statement?

22 MR. SHUMAKER: Good morning, your Honor. Greg
23 Shumaker of Jones Day for the City of Detroit. Yes, your
24 Honor, we did prepare a joint statement of facts in
25 connection with the -- what we've referred to as the

1 assumption motion. We were able to hash that out over the
2 last week or so, and I believe we filed that on Wednesday
3 night.

4 THE COURT: Um-hmm.

5 MR. SHUMAKER: The joint statement of facts with
6 regard to what we referred to as the PPF motion, the DIP
7 motion, is still in progress. We're hopeful, your Honor,
8 that the parties will be able to come up with something
9 before the hearing next week. We've sent back some -- the
10 city sent back a number of comments to the objectors, I
11 think, last night, so we are very hopeful that we'll be able
12 to achieve that, but it's still --

13 THE COURT: Hopeful you'll be able to achieve what?

14 MR. SHUMAKER: Well, a joint statement of facts with
15 regard to the DIP motion.

16 THE COURT: Okay.

17 MR. SHUMAKER: We've submitted that to your Honor.
18 The parties have agreed --

19 THE COURT: Okay.

20 MR. SHUMAKER: -- with regard to the assumption, the
21 forbearance agreement facts.

22 THE COURT: Okay. And that's all wonderful, and I
23 appreciate that all very much. My question had more to do
24 with the more standard, you know, joint pretrial statement
25 where you state your claims, you state the defenses, you

1 state who the witnesses will be and what the exhibits will
2 be.

3 MR. SHUMAKER: Well, along those lines, the short
4 answer, I think, your Honor, is, no, we have not been
5 operating under the standard joint pretrial order process
6 because we thought that it was not appropriate, but we have
7 been working on --

8 THE COURT: That's okay. We can still accomplish a
9 lot here this morning. Have all of the exhibit lists been
10 finalized --

11 MR. SHUMAKER: I believe they have, your Honor.

12 THE COURT: -- by all of the parties on both sides?

13 MR. SHUMAKER: All of the exhibit lists have been
14 submitted to the Court. The only reservation is that there
15 are continuing depositions. There's one or two depositions
16 left. The parties reserve the right to supplement, but, yes,
17 the exhibit lists have all been provided, have been filed,
18 and what we are hoping to do along the lines of a pretrial
19 order that we haven't been following, but is to come up with
20 what we've talked about with regard to the eligibility
21 hearing where we do what your Honor is I would suggest
22 proposing, which is that there would be a joint list where
23 there would be a list of the documents to which there is no
24 objection, and your Honor could rule on the admissibility of
25 those, and then a corollary with the list of exhibits to

1 which there have been objections.

2 Now, the city has provided its objections to the
3 objectors. We're waiting and discussing with them waiting
4 for their objections to the city's exhibits, but that's
5 underway, and we also hope to have that filed hopefully
6 Monday. Obviously there's not a lot of time, but we are
7 working on that actively.

8 THE COURT: Okay. All right. Does anyone see any
9 obstacle to getting that to the Court by the close of
10 business on Monday? All right. But just to be, you know, as
11 technically accurate about this as we can, there was some
12 overlap in exhibits at the eligibility trial --

13 MR. SHUMAKER: Yes, your Honor.

14 THE COURT: -- which created a little bit of
15 confusion. I would encourage you to try to minimize that as
16 much as possible, so if the city has offered an exhibit, I
17 would discourage other parties from including that same
18 exhibit on their lists.

19 MR. SHUMAKER: We'll do everything we can, your
20 Honor.

21 THE COURT: If it's an exhibit, you know, in a
22 different form or if it has, you know, attachments to it that
23 the city's doesn't have, okay, but if it's the exact same
24 pieces of paper, we don't need it twice.

25 MR. SHUMAKER: Thank you, your Honor.

1 THE COURT: In terms of numbering, I like the
2 numbering system we used last time where, you know, each
3 party takes a range of numbers in the hundreds.

4 MR. SHUMAKER: Your Honor, I believe that the city
5 had zero through a hundred, although we have more than a
6 hundred exhibits, so we may have to hog the --

7 THE COURT: Yeah.

8 MR. SHUMAKER: -- zero to 200 range.

9 THE COURT: Fine.

10 MR. SHUMAKER: But we can figure --

11 THE COURT: Whatever you work out is fine. I just
12 don't want parties to use the same numbers --

13 MR. SHUMAKER: Understood, your Honor.

14 THE COURT: -- because that's going to be confusing.

15 MR. SHUMAKER: One outstanding issue on that is,
16 your Honor, the city has provided electronic copies of all of
17 its exhibits to the objectors. We've asked for those in
18 return, but I think we've -- I don't know how many objectors
19 have responded. As of yesterday, it was one, but it
20 facilitates the issue of figuring out what exhibit it is and
21 so that we can give the objections back. I don't know if a
22 deadline is necessary, but we have had some difficulty in
23 that regard.

24 THE COURT: Well, let me just ask. Can you all get
25 your exhibits to the city in the electronic format that they

1 provided to you by the close of business today? All right.
2 Hearing no objection, I'll assume that will be done. So
3 after the hearing today, I would encourage you all to
4 collaborate together on who gets what exhibit numbers, what
5 exhibit ranges are assigned to which parties. Okay?

6 MR. SHUMAKER: Certainly, your Honor.

7 THE COURT: Now, who are your witnesses?

8 MR. SHUMAKER: The witnesses right now are the five
9 that I mentioned last time we met, your Honor, the day before
10 Thanksgiving --

11 THE COURT: Remind me.

12 MR. SHUMAKER: -- which was Mr. Moore from Conway
13 MacKenzie, Mr. Doak from Miller Buckfire, Mr. Malhotra from
14 Ernst & Young, Mr. Buckfire, and Mr. Orr. Those are the
15 five. And I think I have --

16 THE COURT: All right. But I want to be sure that
17 you constrain your examination of those witnesses to the
18 issues that I identified here.

19 MR. SHUMAKER: We will do that, your Honor.

20 THE COURT: All right. I'd like to hear the names
21 of the witnesses that the objecting parties intend to call,
22 so let's have that, please. Who'd like to go?

23 MR. HACKNEY: I'm sorry. I didn't hear. I'm sorry.

24 THE COURT: I'm sorry to you, sir. My question is
25 who's -- what witnesses are the objecting parties going to

1 call?

2 MR. HACKNEY: I'll let each speak for their --

3 THE COURT: Yeah.

4 MR. HACKNEY: My name is Stephen Hackney, your
5 Honor, on behalf of Syncora. At this point, we only have a
6 may call witness. We have not determined today that we will
7 call him, and I would propose to monitor the course of the
8 hearing and give counsel for the other side 24 hours' notice
9 or 48 hours' notice if I refine that. I was -- refine that
10 into the intention to call for certain. I was hoping that I
11 might ask the city to provide us with the order of the
12 witnesses by the close of business today. It helps us
13 coordinate our preparation of cross-examination amongst
14 objectors.

15 THE COURT: So who's your may call witness?

16 MR. HACKNEY: It is a potential expert witness by
17 the name of Mr. Davido.

18 THE COURT: Okay.

19 MR. HACKNEY: Yeah.

20 THE COURT: Who else is going to call witnesses?

21 MR. GOLDBERG: Good morning, your Honor. Jerome
22 Goldberg appearing on behalf of interested party David Sole.
23 Your Honor, I'd like -- I just had one question, if I may. I
24 was a little confused on the second point in your order on
25 the issue of collectibility. I guess maybe I should just

1 listen to it again, but I was a little confused. There were
2 two --

3 THE COURT: Well, it's not that complex. To the
4 extent that whatever claims third parties have against the
5 city, the issue of the collectibility of the city is an issue
6 to be taken into account in determining the fairness of the
7 settlement. Anyway --

8 MR. GOLDBERG: Okay. I understand it better now.

9 THE COURT: Okay. Who's your --

10 MR. GOLDBERG: I was -- my own confusion.

11 THE COURT: Who's your witness?

12 MR. GOLDBERG: I intend to call, at least at this
13 point, Wallace C. Turbeville as basically an expert on the
14 first issue. That's my -- the one witness.

15 THE COURT: When you say "the first issue," you
16 mean --

17 MR. GOLDBERG: The issue on the equitable questions
18 concerning the forbearance agreement itself and the DIP in
19 relation to the forbearance agreement. I also do have a
20 recall witness that's a -- a rebuttal witness who is Sharon
21 McPhail. It was one of the people involved in the -- on City
22 Council at the time of the hearing itself -- I just actually
23 ran into her two days ago -- as a potential rebuttal witness.

24 THE COURT: Thank you.

25 MR. GOLDBERG: Can I ask one other question, your

1 Honor?

2 THE COURT: Sure.

3 MR. GOLDBERG: I'm sorry for --

4 THE COURT: That's all right.

5 MR. GOLDBERG: -- my inexperience. The city did
6 file a number of objections to exhibits that, you know, I
7 proffered, and will there be a hearing? You don't intend to
8 hear those objections today or -- I was just trying to get
9 some advice on that.

10 THE COURT: No, I don't. You know, during the
11 course of the hearing when it comes time for your case --

12 MR. GOLDBERG: Okay.

13 THE COURT: -- you will proffer those exhibits in
14 the ordinary course, and if the city still objects, I'll hear
15 those objections and your response.

16 MR. GOLDBERG: Thank you, your Honor.

17 MS. DIBLASI: Your Honor, Kelly DiBlasi on behalf of
18 Financial Guaranty Insurance Company. We intend to call
19 Stephen Spencer of Houlihan Lokey as a witness.

20 THE COURT: Okay. Thank you.

21 MS. DIBLASI: Thank you.

22 MS. GREEN: Jennifer Green on behalf of the
23 Retirement Systems. We had intended as may call witnesses
24 Ann Langan and Irvin Corley of the City Council staff and
25 Thomas Gavin. However, based upon today's ruling, we'll be

1 reassessing our may call list.

2 THE COURT: Okay. Any other witness names? I do
3 want to discuss the issue of limiting time on each side for
4 presentations.

5 MR. HACKNEY: Your Honor, I had some collected
6 thoughts I was going to offer at some point, and I just
7 wanted to make you aware of that.

8 THE COURT: Regarding this issue or a different
9 issue?

10 MR. HACKNEY: It relates very directly to this issue
11 and to the organization of the hearing.

12 THE COURT: Go for it.

13 MR. HACKNEY: Your Honor, I wanted to tell you that
14 the objectors have been working together to try to organize
15 the presentation of it for the Court so it's as coherent as
16 possible. That's not always easy because --

17 THE COURT: Right.

18 MR. HACKNEY: -- the objectors don't always
19 object -- in addition to the fact that we're all different
20 firms and entities, but --

21 THE COURT: Right.

22 MR. HACKNEY: -- we don't always object for the same
23 reasons, but we've had some success. We have eight hours
24 that's been allocated to our side by your order, and what we
25 have done is we had a proposal for you about how we hope to

1 strike the allocation of time, and I was hoping I could lay
2 that out for you in the way of suggestion as to how it may
3 be --

4 THE COURT: Okay.

5 MR. HACKNEY: -- most efficient. The first thing is
6 we are going to endeavor to use a lead cross-examinationer as
7 a way of trying to get someone to cover the main body of a
8 witness' cross on behalf of all objectors subject to the
9 important point that each individual objector will retain the
10 right to do discrete amounts of cleanup if they have unique
11 issues, but we hope to use a lead questioner style method of
12 cross-examination. We hope to spend approximately -- we
13 intend not to do opening statements unless the Court really
14 wanted them. The briefs so --

15 THE COURT: Yeah. I leave it optional to you.

16 MR. HACKNEY: Our intention was not to spend our
17 time on opening statement unless you just preferred
18 otherwise.

19 THE COURT: I don't.

20 MR. HACKNEY: We hoped to spend approximately four
21 and three-quarters hours on our witness cross-examination
22 and/or our directs. I will tell you that it is somewhat --
23 it's more art than science when you're trying to predict time
24 on that. It relates to things like witness responsiveness
25 and a host of factors.

1 THE COURT: Of course.

2 MR. HACKNEY: That is our going in strategy, and we
3 would then retain three and a quarter hours for closing
4 argument.

5 THE COURT: Okay.

6 MR. HACKNEY: We propose to have an -- what we call
7 an issue-based closing argument as opposed to a party-based
8 closing argument. The idea is to try to avoid repetition.
9 And so I wanted to suggest to you what we had thought the
10 different mainline issues would be, although it's been
11 impacted somewhat by today, but I was going to offer them for
12 your consideration.

13 THE COURT: I have to say in this regard, you know,
14 that how you divide this up among yourselves or what issues
15 you articulate is not something I need right now, so if you
16 want to keep this to yourselves and/or reconsider it at some
17 point, that's fine, but, you know, my main issue is in fixing
18 this time and making sure we're all on the same page
19 regarding it, and it sounds like we are.

20 MR. HACKNEY: Yeah. Thank you, your Honor. I just
21 didn't want to be in a position where I was presuming to tell
22 you what we would be spending our argument time on because
23 the argument, of course, is supposed to aid you in your
24 determination, so I wanted you to have an opportunity to tell
25 me, no, I don't want argument on that, I want argument on

1 this, and so forth, but we can caucus in light of today.

2 THE COURT: You can rest assured that if anyone is
3 arguing into a vicinity that I don't think is helpful, I will
4 let you know.

5 MR. HACKNEY: I have personal experience with that,
6 so thank you, your Honor.

7 THE COURT: You do.

8 MR. HACKNEY: Your Honor --

9 THE COURT: You asked for that.

10 MR. HACKNEY: I did. I did, and I take it
11 willingly. I have a follow-up question, if I could ask you,
12 about witnesses because -- and I'll let Mr. Hamilton respond
13 to this after I do, but with respect to the views you
14 expressed on 904 versus 364, obviously notwithstanding our
15 disagreement, it's heard and understood on our part, but I
16 wanted to tell you that my interpretation of what you said to
17 me when I look at Mr. Moore's declaration -- he's the Conway
18 MacKenzie individual who he details here are the different
19 problems, here's how we're going to use the money, and here's
20 why it's going to fix them, and so on and so forth -- that
21 that would not be relevant under the standard as you
22 articulate it. Now, I don't want overstep, but --

23 THE COURT: That's right.

24 MR. HACKNEY: -- do you agree? Okay. That's
25 helpful to me because we're in the process of preparing, so

1 I'll caucus with Mr. Hamilton about that, but that was a
2 point of clarification.

3 THE COURT: All right.

4 MR. HACKNEY: So I've hit all the issues that I hit,
5 and I hope I addressed your question about how we intend to
6 use our time and --

7 THE COURT: Yes.

8 MR. HACKNEY: -- who we intend to use it with.
9 Thank you.

10 MR. HAMILTON: Robert Hamilton of Jones Day on
11 behalf of the City of Detroit, your Honor. I did have just a
12 brief moment to caucus with Mr. Hackney, and I'm not sure
13 we've worked all of this out. With respect to witnesses that
14 both sides are going to call on the motion to approve the
15 post-petition financing, it seems, given the Court's ruling,
16 that most, if not all, of the testimony that was previewed in
17 Mr. Moore's declaration would not be necessary and, in fact,
18 would be immaterial under the standard you've articulated.

19 THE COURT: Under the standard that you advocated.

20 MR. HAMILTON: Under the standard that we advocated.
21 I've advocated things, and I don't always win what I
22 advocate, your Honor, so we were trying to cover all our
23 bases. The two experts that the objectors have identified,
24 Mr. Davido and Mr. Spencer, the opinions that they proffered
25 at their depositions relate to an issue that appears to fall

1 on the irrelevant side, but if it doesn't, then Mr. Moore
2 would be relevant.

3 THE COURT: Okay. I have to -- I have to ask you to
4 defer your argument on this until they actually testify.

5 MR. HAMILTON: Well, it goes to whether we're going
6 to have three witnesses here or zero on the issue of do we
7 need to borrow the money now. If the question of do we need
8 to borrow the money now or do we have enough money without
9 borrowing to do what we want to do, if that's not within your
10 scope of review under your ruling today, then neither Mr.
11 Moore nor Mr. Spencer nor Mr. Davido are relevant, and they
12 don't need to come here next Tuesday.

13 THE COURT: If you want me to find that it is
14 relevant that it is necessary to borrow this money now --
15 this is your motion, you know -- then that suggests all that
16 is relevant.

17 MR. HAMILTON: Our position is you don't need to
18 find that, and we don't need to ask you to find that. And if
19 that's the case, we would not need to call Mr. Moore, but
20 then neither would Mr. Spencer or Mr. Davido need to come.
21 And the only reason I raise it now is because it's a
22 pretrial, and we'd kind of like to know in advance whether
23 these three witnesses are going to have to be here on Tuesday
24 or not. Our position is it's not relevant given your ruling,
25 and I have not had a full opportunity to confer with Mr.

1 Hackney other than we thought it might be appropriate to
2 raise it today to get it resolved. That's all I had to say
3 at the moment.

4 MR. MARRIOTT: Your Honor, Vince Marriott, EEPK. If
5 I could just speak to the findings, I think that the city's
6 proposed order that accompanied the motion does request
7 findings on those issues. If the city is prepared to submit
8 a revised proposed order that strips out asking for these
9 things, then I think we are in a better position to decide
10 whether we need that, but so long as the proposed order asks
11 findings on that sort of thing, you know, we're sort of
12 stuck.

13 THE COURT: And that's why I asked the question that
14 I asked, so I think the answer is really in -- of the city's
15 own making. If there's a finding you want me to make, you
16 better submit evidence of it, but then you open the door to
17 rebuttal evidence on it. Otherwise I don't see the relevance
18 of the necessity of the borrowing for the 364 motion, but,
19 you know, it's your motion, so if you want me to make a
20 finding on it, it's up to you. If you say no, then the
21 objecting parties will rely on that, and, you know, you can't
22 argue that they didn't submit any evidence.

23 MR. HAMILTON: Your Honor, I think we are going to
24 take the position that it's irrelevant. I think what we
25 should do is that I should just caucus with Mr. Marriott and

1 Mr. Hackney, and we should work this out by Tuesday.

2 THE COURT: That's an excellent idea. I have to say
3 one more thing in the interest of justice. I wouldn't
4 normally say this, but with all due respect to Mr. Orr, I
5 need to emphasize to him through his counsel here the
6 necessity of him being responsive to the questions and with
7 the caution that if he is not, as he was not during the
8 eligibility trial, that may constitute grounds or cause to
9 extend the objecting parties' time to present their case.

10 All right. I need to get back to the issue of the
11 privilege log, but before I do that, I want to see if there's
12 anything else we need to cover in the context of this final
13 pretrial conference. We have several willing attorneys, so
14 we'll just race to the lectern.

15 MR. GOLDBERG: Sorry, your Honor. Jerome Goldberg
16 on behalf of interested party Sole. I know I'm asking the
17 indulgence of the Court, and if I'm out of line, let me know,
18 but I have a -- honestly speaking, I'm operating in this case
19 on virtually no budget, and my expert is testifying on that
20 basis. I was just wondering if it's possible for me to get a
21 sense of when I would need to -- and I have to fly him in
22 from New York --

23 THE COURT: Um-hmm.

24 MR. GOLDBERG: -- when he might be testifying. I
25 mean I normally would not ask, but I'm not in a position to

1 even pay him as my client is not in a position to pay myself.

2 THE COURT: Remind me how much time we allocated for
3 the city. Was it seven, seven hours?

4 MR. SHUMAKER: Yes, your Honor.

5 THE COURT: Okay. So we may or may not quite get
6 through the city's case on Tuesday, right, depending on
7 recesses and whatnot, so it would either be sometime during
8 the day on Wednesday or Thursday, so I would suggest that you
9 collaborate with your fellow objecting parties' attorneys and
10 see if you can agree upon the order in which witnesses are
11 called, and that'll give you a much better sense of when your
12 witness would come up.

13 MR. GOLDBERG: Thank you very much, your Honor.

14 THE COURT: Okay. Ms. Fish, you wanted to be heard?

15 MS. FISH: Yes. I didn't know if Mr. Shumaker was
16 finished with the city's presentation. Deborah Fish from the
17 law firm of Allard & Fish on behalf of the ad hoc COP
18 holders. Similar to Mr. Goldberg, your Honor, my client
19 would only like to make a five-minute presentation at the
20 hearing. Wondering if, in fact, that could be made at the
21 beginning so that we wouldn't have to appear every day and
22 could just listen by phone.

23 THE COURT: Does anyone object to that?

24 MS. FISH: Thank you, your Honor.

25 THE COURT: All right. We will hear you first thing

1 Tuesday morning then. Would anyone else like to be heard in
2 the context of any joint -- of any final pretrial order
3 issues, questions?

4 MR. HACKNEY: Your Honor, would you indulge me in
5 just one more brief colloquy on part of your ruling because I
6 think it will help us determine whether witnesses need to
7 come?

8 THE COURT: Um-hmm. Go ahead.

9 MR. HACKNEY: Steve Hackney again on behalf of
10 Syncora. You know, I'm loath always to question the Court
11 extensively, and I'll try to avoid that.

12 THE COURT: I appreciate that.

13 MR. HACKNEY: Your job is to rule, and our job is to
14 figure it out, but you talked about the word "need" in the
15 context of the Section 364 versus 904 context, and Mr.
16 Hamilton and you talked about that subject with respect to
17 different witnesses, and I just wanted to articulate a
18 possible distinction and make sure we understand it.

19 The first thing I could see the Court saying is if
20 Mr. Orr decides that the city needs a hundred police cars,
21 I -- as the Court, I am not going to review that decision
22 under 904. My reading of your ruling is that's clearly what
23 you were saying on that point. There is a second concept,
24 though, which is whether or not he should borrow the money to
25 buy the police cars or whether or not he has existing funds

1 with which to borrow the police cars, and this is a second
2 concept, which is the need to borrow. Is that also within
3 the rubric of a decision that you will not review, which
4 is --

5 THE COURT: It is.

6 MR. HACKNEY: It is. That clarifies it, and I
7 appreciate it.

8 THE COURT: But there's an "unless" there, which I
9 asked the city about, unless they want me to find that they
10 need to borrow the money, but the city said, no, they don't
11 want me to find that even though it's apparently in --
12 someone said it's in the order that was proposed with the
13 motion and they're going to collaborate with you on all of
14 that, so --

15 MR. HACKNEY: Thank you.

16 THE COURT: -- if they open that issue up, go for
17 it. If they don't want that finding, I don't think it's
18 necessary or appropriate under 364 in a Chapter 9 case.

19 MR. HACKNEY: Thank you, your Honor.

20 MR. SHUMAKER: One issue, your Honor, which we'd
21 appreciate some clarification on, and that is the time
22 limits. And now that it appears that the city will have
23 seven hours and that the objectors will have eight hours to
24 present their case, does the time allotted to each side
25 include the cross-examination of the --

1 THE COURT: Oh, no. That's lectern time.

2 MR. SHUMAKER: Okay. Okay. Yes.

3 THE COURT: Does that answer your question?

4 MR. SHUMAKER: Yes, that does. That does, yes.

5 Thank you.

6 THE COURT: I keep a running clock by minutes of the
7 time each side is standing at the lectern --

8 MR. SHUMAKER: Thank you, your Honor.

9 THE COURT: -- whether it's opening, cross, direct,
10 or closing. On the privilege log issue, one of the
11 consequences of my earlier statement of the issues is that as
12 an evidentiary matter, I don't think it's relevant what any
13 particular attorney concludes regarding the strengths or
14 weaknesses of any of the claims or defenses are nor do I
15 think it's relevant what any particular attorney on either
16 side for this matter told a client were the strengths or
17 weaknesses of any particular claim or defense. So on the
18 issue of the privilege log, I don't think that any attorney-
19 client communications are particularly relevant in the first
20 instance, so in those circumstances, I cannot conclude that
21 the disclosure of a privilege log is necessary, so I won't
22 require it.

23 All right. Anything further for today?

24 MR. HACKNEY: Can I be heard on that just briefly?

25 THE COURT: Yes.

1 MR. HACKNEY: The only desire for the log is to
2 confirm that the documents that have been withheld are
3 privileged. If they are privileged, I'm not disputing the
4 idea that they can withhold them under the privilege. I'm
5 not saying you'd put it at issue. I'm just saying I want to
6 check.

7 THE COURT: Your concern is that they have withheld
8 documents that weren't communications between attorneys and
9 clients?

10 MR. HACKNEY: Well, yes, because the way
11 privilege --

12 THE COURT: That would be pretty ugly.

13 MR. HACKNEY: Well, no. It's not necessarily
14 uncommon when people are reviewing, especially a pace like
15 this, which is you'll look at the to and from on an e-mail,
16 and if you see an attorney, you'll just mark it, and then
17 you -- when you do the log, then you do the hard calls and
18 say, "Well, yeah, there was an attorney cc'd on this, but
19 this is really Miller Buckfire to business guys talking
20 business stuff."

21 THE COURT: Okay.

22 MR. HACKNEY: Then you produce it. So I didn't want
23 there to be confusion about why I want the log. I'm not
24 trying to say, "Oh, look at what they withheld. This is
25 relevant." I'm trying to check their privilege calls.

1 THE COURT: Any response to that?

2 MR. SHUMAKER: Your Honor, my response would be that
3 when we produce documents, when we gather the documents from
4 the city and we review them and produce them, we do our
5 darndest to give the responsive documents as we did in
6 connection with the PPF motion, and --

7 THE COURT: What motion?

8 MR. SHUMAKER: I'm sorry. The post-petition
9 financing, the DIP motion. I forget which one we're calling
10 it. And so, you know, we've -- we do have to go through a
11 review. We do have a number of people who look at those
12 documents. They operate in good faith, do the best they can.
13 It's, you know, a significant amount of work to undertake
14 just under the possibility that a document was withheld that
15 shouldn't have been. I can't represent to your Honor that
16 that's not possible, but we do have an affirmative ongoing
17 obligation that if we uncover something that is not
18 privileged, we produce it.

19 THE COURT: All right. Well, I'll ask you to file
20 an affidavit then by Tuesday which describes what process you
21 used to determine which documents were privileged or to be
22 claimed as privileged and not disclosed, therefore, what
23 standards the staff used, and I want the representation of
24 who's ever affidavit this is that it is that affiant's good
25 faith belief that all of the documents withheld are subject

1 to a proper claim of attorney-client privilege.

2 MR. SHUMAKER: Certainly will do that, your Honor.

3 THE COURT: All right. We'll be in recess.

4 THE CLERK: All rise. Court is adjourned.

5 (Proceedings concluded at 12:13 p.m.)

INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

December 15, 2013

Lois Garrett

1 UNITED STATES BANKRUPTCY COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

3 IN THE MATTER OF, Case No. 13-53846
4 CITY OF DETROIT, MICHIGAN Detroit, Michigan
December 18, 2013
9:01 a.m.

5
6 IN RE: MOTION OF THE DEBTOR FOR A FINAL ORDER PURSUANT TO 11
7 USC SECTIONS 105, 362, 364(c)(1), 364(c)(2), 364(e), 364(f),
8 503, 507(a)(2), 904, 921, AND 922(I) APPROVING POST-PETITION
9 FINANCING, (II) GRANTING LIENS AND PROVIDING SUPERPRIORITY
10 CLAIMS STATUS AND (III) MODIFYING AUTOMATIC STAY (DKT #1520)
11 MOTION OF THE DEBTOR FOR ENTRY OF AN ORDER (1) AUTHORIZING THE
12 ASSUMPTION OF THAT CERTAIN FORBEARANCE AND OPTIONAL
13 TERMINATION AGREEMENT PURSUANT TO SECTION 365(a) OF THE
14 BANKRUPTCY CODE, (II) APPROVING SUCH AGREEMENT PURSUANT TO
15 RULE 9019, AND (III) GRANTING RELATED RELIEF (DKT #17)
16 CORRECTED MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING THE
17 ASSUMPTION OF THAT CERTAIN FORBEARANCE AND OPTIONAL
18 TERMINATION AGREEMENT PURSUANT TO SECTION 365(a) OF THE
19 BANKRUPTCY CODE (II) APPROVING SUCH AGREEMENT PURSUANT TO RULE
20 9019, and (III) GRANTING RELATED RELIEF (Dkt #157)
21 BEFORE THE HONORABLE STEVEN W. RHODES
22 TRANSCRIPT ORDERED BY: STEPHEN GROW, ESQ.

23 APPEARANCES:

24 For the City of Detroit, MI: CORINNE BALL, ESQ.
25 Jones, Day
222 East 41st Street
New York, NY 10017-6702
212-326-3939

JEFFREY ELLMAN, ESQ.
Jones, Day
1420 Peachtree Street, N.E.
Suite 800
Atlanta, GA 30309-3053
404-521-3939

ROBERT HAMILTON, ESQ.
Jones, Day
325 John H. McConnell Blvd.
Suite 600
Columbus, OH 43216-5017
614-469-3939

1 For Syncora Holdings, Ltd.,
 2 Syncora Guarantee, Inc., and
 3 Syncora Capital Assurance,
 4 Inc.:

STEPHEN HACKNEY, ESQ.
 WILLIAM ARNAULT, ESQ.
 RYAN BLAINE BENNETT, ESQ.
 Kirkland & Ellis
 300 North LaSalle
 Chicago, IL 60654
 312-862-2000

5 For the Ad Hoc COPS Holders:

DEBORAH FISH, ESQ. (P36580)
 Allard & Fish
 2600 Buhl Building
 535 Griswold
 Detroit, MI 48226
 313-961-6141

THOMAS MOERS MAYER, ESQ.
 Kramer, Levin, Naftalis &
 Frankel
 1177 Avenue of The Americas
 New York, NY 10036
 212-715-9100

12 For General and Police and
 13 Fire Retirement Systems:

JENNIFER GREEN, ESQ. (P69019)
 Clark, Hill, PLC
 500 S. Woodward Avenue
 Suite 3500
 Detroit, MI 48226
 313-965-8300

15 For Erste Europäische
 16 Pfandbrief and
 17 Kommunalkreditbank
 18 Aktiengesellschaft in
 19 Luxemborg, S.A.:

VINCENT MARRIOTT, III, ESQ.
 Ballard, Spahr
 1735 Market Street
 Philadelphia, PA 19103
 215-665-8500

20 For Interested Party David
 21 Sole:

JEROME GOLDBERG, ESQ. (P61678)
 Jerome Goldberg, PLLC
 2921 East Jefferson
 Suite 205
 Detroit, MI 48207
 313-393-6001

22 For Financial Guaranty
 23 Insurance Company:

ALFREDO PEREZ, ESQ.
 Weil, Gotshal & Manges, LLP
 700 Louisiana Street
 Suite 1600
 Houston, TX 77002
 214-746-7700

1 For Ambac Assurance CORPORATION: CAROLINE TURNER, ENGLISH, ESQ.
2 Arent, Fox, LLP
3 1717 K Street, N.W.
Washington, D.C. 20036-5342
202-857-6000

4 For U.S. Bank as Trustee DAVID LEMKE, ESQ.
5 For Water and Sewer Bonds: Waller, Lansden, Dortch & Davis
6 Nashville City Center
7 511 Union Street
Suite 2700
Nashville, TN 37219
615-244-6380

8 For FMS Wertmanagement: RICK FRIMMER, ESQ.
9 Schiff, Hardin, LLP
233 South Wacker Drive
Suite 6699
10 Chicago, IL 60606-6473
312-258-5500

11 For the Detroit Retired RYAN PLECHA, ESQ. (P71957)
12 City Employees Association, Lippitt, O'Keefe
13 Retired Detroit Police and 370 East Maple Road
14 Fire Fighters Association, 3rd Floor
Shirley V. Lightsey, and Birmingham, MI 48009
Donald Taylor (Retiree 248-646-8292
Association Parties):

15 Court Recorder: Letrice Calloway

16 Transcriber: Deborah L. Kremlick

17
18
19 Proceedings recorded by electronic sound recording, transcript
produced by transcription service.
20
21
22
23
24
25

INDEX

WITNESSES FOR
THE DEBTOR:DirectCross

JAMES DOAK	11	36, 46, 51
KEVYN ORR	76	

EXHIBITS:ID ADM

CX90	Presentation	21	22
CX91	Briefing Materials	31	32
CX94	Commitment Letter	26	28
CX96	Letter	24	24
CX97	Response from Treasurer Dillon	26	26
RSX1003	Email	64	68
RSX1005	Email	65	68

1 (Court in Session)

2 THE CLERK: All rise. Court is in session. Please
3 be seated. Case number 13-53846, City of Detroit, Michigan.

4 THE COURT: Good morning. One moment, please. Sir.

5 MR. ERENS: Good morning, Your Honor. Again Brad
6 Erens on behalf of the City of Detroit.

7 If it please the Court, we thought before we went on the
8 clock this morning we'd give the emergency loan board report
9 Your Honor asked for yesterday afternoon.

10 THE COURT: Yes.

11 MR. ERENS: Mr. Steve Howell of Dickinson, Wright is
12 here on behalf of the state and I'm going to have him give the
13 report.

14 THE COURT: Okay.

15 MR. ERENS: Thank you.

16 MR. HOWELL: Good morning, Your Honor. Steven G.
17 Howell, Dickinson, Wright appearing as Special Assistant
18 Attorney General on behalf of the state.

19 Your Honor, I understand there were questions that came
20 up yesterday and I'd like to address a couple of them that I
21 understand were raised. One is in terms of the members of the
22 board, emergency loan board, they are Kevin Clinton, State
23 Treasurer, John Nixon, Director of the Department of
24 Technology Management and Budget, and Steve Arwood, Director

25 of Licensing and Regulatory Affairs.

1 Your Honor, there is underway an effort to get a meeting
2 scheduled. There is 18 hours notice required under the Open
3 Meetings Act. We hope to have that meeting scheduled by the
4 -- either on Friday afternoon, or Monday. And that is the
5 soonest we can have it set up, Your Honor.

6 THE COURT: What is the nature of the loan board's
7 review?

8 MR. HOWELL: It's not real clear. The -- the
9 requirement -- the review is under the Home Rule Cities Act,
10 not under PA436. And it is simply a requirement that it
11 comply with the procedures and requirements of -- of the --
12 let me just read it for you if I could.

13 THE COURT: Okay, sure.

14 MR. HOWELL: And it's the Home Rule City Act 279,
15 Section 36(a)(2). Any financial recovery bonds issued under
16 this section are subject to the terms and conditions approved
17 by the local emergency financial assistant loan board created
18 under the Emergency Municipal Loan Act.

19 And that is the extent of the guidance in the statute.
20 It will be presented to them. They will ask whatever
21 questions they have and make their decision at that time.

22 THE COURT: Why wasn't this done before this
23 hearing?

24 MR. HOWELL: I think at the time I think their

1 that may come up in the course of this proceeding, in the
2 course of any negotiations, the Judge's ruling, that what we
3 would present to the emergency loan board would be that which
4 was final and concluded. Whether that was a correct judgment
5 with the benefit of hindsight, is another question. But that
6 was the thinking at the time that we would simply present what
7 was the final outcome as opposed to having to possibly go back
8 later if there were changes between what was approved earlier
9 and what ultimately --

10 THE COURT: Someone actually made the decision to
11 potentially risk wasting the Court's time and all of the
12 attorney fees in this case?

13 MR. HOWELL: That was -- that was certainly not --

14 THE COURT: Should the loan board decide not to
15 approve whatever loan this Court approves?

16 MR. HOWELL: That was not the intention, Your Honor.
17 The intention was not to show any disrespect to this Court.

18 THE COURT: Well, it's not -- of course it wasn't
19 your intention, but that's the risk, right?

20 MR. HOWELL: That is -- that is the risk. We are
21 hopeful that will not happen, but that -- that is a risk that
22 exists, Your Honor, I can't change that.

23 THE COURT: Well, let me just put it to you
24 directly. Is there any reasonable likelihood that the loan

1 MR. HOWELL: Well, the question will be presented
2 and needs to be made. That decision needs to be made in -- in
3 the meeting that is scheduled under the Open Meetings Act.
4 But I do not expect there -- we do not expect there to be an
5 issue, but that is -- that -- that decision has to be made at
6 that meeting at that time under the Open Meetings Act, Your
7 Honor.

8 THE COURT: Well, but -- okay. So suppose one or
9 more of the objecting parties here wish to address the loan
10 board with the same or perhaps even different issues on why
11 the loan board shouldn't accept it. Will -- will -- will that
12 be permitted?

13 MR. HOWELL: I suppose they -- I don't know the
14 procedure for presenting evidence at that hearing. I don't
15 know that there is a procedure for presenting evidence. But
16 if it is, I would -- I would expect that that board would be
17 before this Court.

18 THE COURT: I wasn't asking about evidence, I was
19 just -- that's another question. I was just asking about
20 whether parties are permitted to be heard on the issue of
21 whether the loan should be approved at that administrative
22 level.

23 MR. HOWELL: It is an open -- it is an open meeting
24 under the Open Meetings Act. So I suppose someone could come
25 in. I -- I do not expect the members as constituted of that

1 board to disregard the Court's view of this when -- when the
2 ruling is completed. And we are confident it will be -- be
3 approved, but we cannot say that or give any real guidance
4 prior to that meeting occurring.

5 THE COURT: Is it your recommendation that the Court
6 proceed?

7 MR. HOWELL: It is, Your Honor.

8 THE COURT: Thank you, sir.

9 MR. HOWELL: Thank you, Your Honor.

10 THE COURT: One more moment, please. At the
11 beginning of this case, I resolved to myself that I would
12 never have an off the record conversation with counsel because
13 the case is too public for that.

14 A circumstance, however, has arisen that has forced me to
15 reconsider that and so I want to see Ms. Ball and Ms. (sic)
16 Hackney at the side of the bench here right now.

17 (At Side Bar Off the Record at 9:09 a.m.; Resume at 9:10
18 a.m.)

19 THE COURT: All right. Let's proceed.

20 MR. HAMILTON: Good morning, Your Honor. Robert
21 Hamilton of Jones, Day on behalf of the City. We're going to
22 continue with the direct examination of -- of James Doak.

23 THE COURT: Sir, you are still under oath. You may
24 be seated.

25 THE WITNESS: Thank you.

1 (WITNESS JAMES DOAK WAS PREVIOUSLY SWORN)

2 DIRECT EXAMINATION

3 BY MR. HAMILTON:

4 Q Good morning, Mr. Doak.

5 A Good morning.

6 Q When we broke yesterday afternoon, evening we were on
7 City's Exhibit 88 which is the September 26th, 2013 financing
8 discussion dec that you testified you provided to Mr. Orr, the
9 City's CFO, and to then State Treasurer Andy Dillon. And we
10 were on the second page of the dec which is up there on the
11 screen.

12 And I wanted to ask you, the first two columns after all
13 the names of the alternative lenders has a column that CA sent
14 and CA signed. What does the CA refer to?

15 A That refers to confidentiality agreement. So the first
16 column is parties that received the confidentiality agreement
17 and then parties that returned it executed.

18 Q And then the next column is 9-6 check in. What is that?

19 A For parties that received the introductory packet at the
20 -- at the commencement of the process. We had asked them to
21 get back to us on the 6th of September to indicate whether they
22 were anticipating preparing a -- a term sheet or indication of
23 interest.

24 Q Okay. And then the next column has the label data room.

25 What is that?

1 A We anticipated at the outset of the process that some of
2 the parties may ask for access to a data room and we -- this
3 column was intended to track those that -- that were admitted
4 into the data room.

5 Q And if you go down to the -- the very bottom on that
6 column under the grand total which as I understand it combines
7 both the lenders on this page and the previous page, the
8 traditional lenders. It has a total of eight out of 50 with
9 access to the data room, is that right?

10 A That's correct.

11 Q Why such a small number?

12 A Of -- in the -- in the time frame of getting to the term
13 sheets, a number of the parties did -- did not request access
14 to the data room. In -- they felt that they could produce the
15 term sheet without access to the data room and as a result
16 only -- only eight subsequently entered the -- the data room.

17 Q Did they have discussions with you in -- in lieu of going
18 to the data room on other topics?

19 A Yes, they did. Most of our discussions with the parties
20 in advance of deliveries of the term sheet concerned
21 structuring of the -- structuring of the loan and the
22 provisions in the indicative term sheet. Parties were less
23 concerned with the financial and operational data that was in
24 the data room that the City operated.

1 before the 26th and after the 26th, what was the most important
2 areas of concerns that were expressed by the lenders to you?

3 A The most -- the areas that were most frequently addressed
4 by the lenders were the state of the Chapter 9 filing and the
5 protections including collateral that the lenders would
6 receive in the -- in making the loan and how those protections
7 and collateral would be affected by various litigative
8 outcomes including the appeal of the Chapter 9 and a -- an
9 overturning of the -- the -- the Chapter -- Chapter 9 as well
10 as other issues associated with 436.

11 Q And when you say the appeal of Chapter 9, do you mean the
12 appeal of the eligibility ruling for Chapter 9?

13 A Yes. The lenders were concerned that the Court's
14 decision on the eligibility of the city would be overturned in
15 the appellate process and at that point they would have a -- a
16 loan agreement that would potentially have state -- state
17 components and federal components, but the federal components
18 could be viewed as being inactive or not part of their loan
19 any longer.

20 Q So how did the concern regarding loan structure and
21 collateral relate -- relate to the concern about the
22 possibility that the Chapter 9 eligibility ruling would be
23 reversed and this case would be dismissed? How did those two
24 relate?

25 A None -- none of the lenders felt comfortable in

1 proceeding forward. None of them indicated to us that they
2 were -- were willing to proceed forward without -- and being
3 provided collateral and collateral that could be provided to
4 them under state law as well as -- as federal law.

5 MR. ARNAULT: Objection, Your Honor. That's
6 hearsay.

7 THE COURT: Overruled.

8 Q The last column on Page 2 of this dec is title -- not the
9 last column, second to last one is -- is term sheet. What
10 does that refer to?

11 A That refers to potential lenders who got back to us with
12 written indications of interest to participate in the
13 financing.

14 Q Now in the -- if you look at the very bottom on that
15 column, the grand total is 15 out of 50. Yet in the City's
16 motion and your declaration and -- and in some other testimony
17 we have indicated that we got a total of 16 term sheets, not
18 15. Why does that say 15 but elsewhere we say 16?

19 A Subsequent to the date of this document, CSG Investments
20 which also goes by the name Beal Bank in our process submitted
21 an indication of interest.

22 Q And they're the one that's close to the middle of the
23 page there on the alternative lender's side, right?

24 A That's correct.

1 this exhibit, what does this page represent?

2 A This page represents the comparative economics of solely
3 the -- the swap termination portion of the post-petition
4 financing amongst the various parties.

5 Q And then the next page of the exhibit shows what?

6 A The next page shows the same mathematics for the quality
7 of life component of the facility.

8 Q And then Page 5 of the next page shows what?

9 A Page 5 shows the comparative economics of the proposal --
10 proposals that we received for the entire financing and for
11 the total facility.

12 Q Okay. Now there's a -- there's a black bar down the
13 middle of this chart. There's three potential lenders on the
14 left side of that -- of that black bar and there's five on the
15 right side. What's the significance of that black bar?

16 A At the time these were the three potential lenders that
17 we were recommending that we proceed forward with to
18 definitive commitment letters.

19 Q The three to the left of the bar?

20 A That's correct.

21 Q And why -- why were you recommending proceeding with
22 those three and not with the other five?

23 A We were recommending those three because of the -- their
24 -- all in terms of their -- their indicative term sheet,

1 strength of the institutions.

2 Q And if you'll look on the -- the -- under the Barclays
3 column, the second lender there to the left of the bar. If
4 you go down to the -- the bottom totals on the difference from
5 lowest all in rate and difference from lowest all in expense,
6 dashes there for Barclays. Why is that?

7 A Because this -- this row showed sort of distance off the
8 lead. And at this point Barclays was the lead and that they
9 were the lowest all in rate provider of financing.

10 Q All right. Now does this all in cost analysis reflect
11 the market flex provision that ultimately ended up in the
12 Barclays facility?

13 A No. No, it does not.

14 Q Why not?

15 A Because at -- at this time the indicative term sheet that
16 they provided us did not have a market flex provision.

17 Q All right. After you recommended to the -- I assume you
18 made your recommendation to Mr. Orr, the emergency manager.
19 I'm assuming the three to the left of the bar, is that right?

20 A Yes, we did.

21 Q All right. After you made that recommendation, what did
22 you do?

23 A We -- we indicated to those three institutions that we
24 would like to see from them definitive executable commitment

25 letters on -- on the lines of their indicative term sheets.

1 Q And did you go after anybody else other than those three?

2 A Subsequently we incorporated the syndicate of lenders led
3 by Carval which is the next -- the next column over.

4 Q Why did you decide to do that?

5 A Because we were not confident we would get to acceptable
6 commitment letters from all three of the -- the lenders. We
7 had issues with -- individual issues with all of them, but --
8 but significant issues with Bank of America and with -- and
9 with Goldman.

10 Q And so what were you -- what was your concern then as to
11 why -- why you needed to get someone else in -- in -- in the
12 room?

13 A Our -- our concern was we were headed towards a one horse
14 race and that would give us very limited flexibility in case
15 for some reason we were not able to arrive at acceptable terms
16 with Barclays and recognizing that Carval was a close fourth.
17 We incorporated them back into the process.

18 Q Let me ask you now about City Exhibit 89.

19 MR. HAMILTON: And this too, Your Honor, is already
20 in evidence because it was not objected to.

21 Q What is this document, Mr. Doak?

22 A This was the briefing materials that we provided to the
23 emergency manager and -- and others providing the real time
24 status update on negotiating commitment letters and -- and the
25 form of the definitive commitment letters that we got back

1 from the four lead potential lenders.

2 Q Did you also give this to then State Treasurer Andy
3 Dillon?

4 A Yes. The -- the working group was -- was the same set of
5 individuals.

6 Q As the previous dec?

7 A As the previous dec. The Director of Michigan Finance
8 Authority, the Treasurer, CFO, other members of the EM staff.

9 Q All right. So if we go to the next page of this exhibit
10 which is Page 1 of the dec.

11 A This is a comparison of the principal economic terms of
12 Barclays and Carval which were at that time developing into
13 our two lead potential commitment letters.

14 Q And then on Pages 3 and 4 you got the same discussion
15 with respect of Bamil and Goldman Sachs, is that right?

16 A That's correct.

17 Q All right. Go back to Page 1. Under the Barclays
18 columns, halfway down there's a thing for market flex. We now
19 have information there on the market flex. Why is that?

20 A In their definitive commitment letters, Barclays
21 incorporated in market flex terms into what they -- into their
22 overall commitment.

23 Q Okay. If we load to Page 5 of this exhibit, the one
24 that's labeled 5, what is this?

25 A This is a -- this is a comparison of all in cost analysis
13-53846-1 Doc 22-80 Filed 12/20/13 Entered 12/20/13 21:20:33 Page 18 of 128 464
574

25. October 3rd, 2013 at 8:00 a.m. What day of the week was that?
 13-58846-SW Doc 43-9 Filed 04/29/14 Entered 04/29/14 22:00:23 Page 165 of 18

1 Is that Thursday?

2 A That was Thursday morning.

3 Q What happened on Friday and over the weekend?

4 A Friday and over the weekend, we negotiated with Barclays
5 and their representatives to come to a final form of
6 commitment letter. We also engaged in dialogue -- you know,
7 dialogue with Carval in regards to furthering on their --
8 their commitment as well.

9 Q All right. And did Barclays send you its commitment
10 letter, signed by the Barclays representative on Sunday the
11 6th?

12 A Yes. At each stage of the process we asked Barclays to
13 -- to bring down their commitment letter and provide us with a
14 executed copy. This is our way making sure in our process
15 that what we had from them was what they were willing to sign.

16 Q Now did Mr. Orr sign the document on Sunday evening the
17 6th when you got the signed ones, the signed letter from
18 Barclays?

19 A No, he did not.

20 Q All right. What did you do on Monday the 7th?

21 A On Monday the 7th, I met -- I start -- I met with members
22 of city council on a one on one basis to brief them on the
23 post-petition financing process and the fact that we would be
24 coming to them shortly with a financing proposal.

25 Q All right. And did you meet with each individual member

1 of the city council on Monday and Tuesday of that week?

2 A Yes, I met with each member of city council on -- on
3 Monday and Tuesday, most on Monday.

4 Q Was that just one meeting or was it individual meetings
5 with each one?

6 A It was individual meetings with each one of the city
7 council members, all six.

8 Q And in those individual meetings with each individual
9 member of the city council, did you provide them with any
10 written materials to explain the process in the terms of the
11 commitments that you had received?

12 A Yes, we did. Or yes, I did.

13 Q All right. I'd like to ask you about City Exhibit 90,
14 Mr. Doak. What is this document?

15 A The -- this is the presentation, the physical briefing
16 materials that I provided to each member of the city council
17 in the one on one meetings that I held with them on October 7th
18 and October 8th.

19 (City's Exhibit 90 was identified)

20 Q And did you discuss the contents of this document with
21 each member of the city council?

22 A Yes, I did.

23 Q During those meetings?

24 A Yes, I did.

1 move Exhibit 90 into evidence.

2 THE COURT: Any objections? It is admitted.

3 (City's Exhibit 90 was admitted)

4 Q If you'll look at what's numbered Page 4 on this dec,
5 which makes it the fifth page in, next page. There you go.

6 If you look at the bullet that starts with this confidential
7 process. Do you see that, Mr. Doak?

8 A Yes.

9 Q Could you read that, please?

10 A This confidential process resulted in a competitive
11 financing commitment on the most favorable terms available in
12 the market.

13 Q What were you referring to with the phrase, a competitive
14 financing commitment in this bullet?

15 A I was referring to the -- the -- the deal that we -- we
16 had in hand from Barclays.

17 Q If we turn to the next page of the exhibit, what does
18 this page show?

19 A This page shows the savings, the opportunity to the City
20 from -- from moving forward with the -- with the termination
21 of the swaps and putting in place the post-petition financing.

22 Q All right. And in the middle column it says annual cost
23 of -- of swap termination load. And then in Italics it says,
24 indicative all in interest rates. Do you see that?

25 A Yes.

1 Q What -- what did you tell the city council members was
2 meant by indicative all in interest rates?

3 A I -- we told them that indicative all in interest rates
4 was meant to represent both the interest rate components which
5 could be a base rate plus a -- plus a -- plus a lift. As well
6 as the fees associated with the deal. So it's consistent with
7 the all in economics concept.

8 Q So it includes both the potential interest rates and the
9 fees involved with the loans, is that correct?

10 A That's correct.

11 Q All right. How did you -- why did you choose the ranges
12 that are in here 5 to 9% to discuss with the members of city
13 council?

14 A I chose the -- the ranges here because I knew that the
15 financing proposal that we had was well within the bounds of
16 this range and I could represent to council members that the
17 financing proposal that we had was within this range without
18 disclosing the specific economics.

19 Q All right. So earlier you said it was the interest rate
20 plus a lift is the term you used. Did you tell each
21 individual council member that there was a market flex
22 provision in the commitment?

23 A I -- I -- I don't recall whether I discussed market flex
24 with them at -- at this time.

1 all in would be somewhere in the range of 5 to 9%, is that
2 right?

3 A Yes. I told -- I told them that this range was a -- was
4 an appropriate range and the financing was going to be well
5 within this -- the range that was presented to them.

6 Q All right. I'd like now to ask you, Mr. Doak, about City
7 Exhibit 96. Are you familiar with this document, Mr. Doak?

8 A Yes.

9 Q What is it?

10 A This is the letter from Kevyn Orr to then Treasurer Andy
11 Dillon requesting his approval as is required under 436 for
12 Kevyn to execute the commitment letter, the Barclays
13 commitment letter to proceed forward with the financing.

14 (City's Exhibit 96 was identified)

15 Q And was this document actually sent to Treasurer Dillon?

16 A Yes, it was.

17 MR. HAMILTON: Okay. Your Honor, the City would
18 move Exhibit 96 into evidence.

19 THE COURT: Any objections? It is admitted.

20 (City's Exhibit 96 was admitted)

21 Q Did you have -- and if we look -- if you'll look at the
22 third page of this exhibit. And this is an attachment to what
23 the letter that was sent to Mr. Dillon, is that right?

24 A Yes.

25 Q And what is this document?

1 A This is the -- this is the fee letter which is one
2 component of the documentation that we were required to
3 execute at that time to proceed forward.

4 Q If you'd go to Page 5 of that fee letter. You'll see --
5 go back one, please. There -- this -- this fee letter is
6 signed by Barclays, is that right?

7 A Yes, it is.

8 Q By Gerbino?

9 A Yes.

10 Q And it's not signed yet by -- by Mr. Orr on behalf of the
11 City of Detroit, is that right?

12 A That's correct.

13 Q And then the next document that's attached is what is
14 that? The next -- there we go. What is that?

15 A This is the commitment letter for the financing.

16 Q And if you go to the last page of that document which is
17 Page 10, the signature page, you'll see that one is signed
18 also by Barclays?

19 A Yes.

20 Q But not yet signed by Mr. Orr, is that correct?

21 A That's correct.

22 Q And this is on Tuesday the 8th when it was sent to Mr.
23 Dillon?

24 A That's -- yes.

25 Q All right. Did you have a discussion with Mr. Dillon
13-53846-9 Doc 22-80 Filed 12/20/13 Entered 12/20/13 22:00:23 Page 25 of 128 471
574

1 about this document, this package on Thursday evening the --
2 the 10th?

3 A Yes, we did.

4 Q And I'd now ask you to look at City Exhibit 97. What is
5 this document, Mr. Doak?

6 A This is the response that we received from Treasurer
7 Dillon coming out of the prior night's conference call when we
8 asked for his approval for Kevyn Orr to execute the commitment
9 documentation for the Barclays loan and --

10 (City's Exhibit 97 was identified)

11 Q Is this document Mr. Dillon's approval of the loan and
12 the -- and authorization for the City to enter into the
13 commitment?

14 A Yes.

15 MR. HAMILTON: Your Honor, the city would move City
16 Exhibit 97 into evidence.

17 THE COURT: Any objections? It is admitted.

18 (City's Exhibit 97 was admitted)

19 Q And again this exhibit is dated October 11th, that's
20 Friday, right?

21 A Yes.

22 Q All right. So let's look at City Exhibit 94 then. This
23 is a copy of the commitment letter from Barclays, right?

24 A Yes.

25 (City's Exhibit 94 was identified)

1 Q And if you look at the signature -- signature page which
2 is ten pages in, I believe, right there. We see that it's
3 executed by Kevyn Orr on behalf of the City of Detroit, is
4 that right?

5 A Yes.

6 Q When did Mr. Orr sign this document?

7 A He signed it on the 11th.

8 Q After you received the approval from Mr. Dillon?

9 A Yes.

10 MR. HAMILTON: And, Your Honor, Exhibit 94 is
11 already into evidence, it wasn't objected to.

12 THE COURT: Thank you.

13 Q Mr. Doak, could you explain to the Court why the City
14 agreed -- why it entered into the commitment letter and agreed
15 to pay the commitment fee to Barclays before it obtained
16 approval from the Bankruptcy Court of this transaction?

17 A We -- we moved forward with executing the commitment
18 letter because it was an integral part of the overall Barclays
19 financing. And it was -- which was the lowest overall cost to
20 the city. And we were -- would not have the ability to
21 proceed forward with negotiating definitive documentation with
22 Barclays unless we executed the commitment letter.

23 Q Why did the city --

24 MR. HAMILTON: Your Honor, I -- I misspoke. There

1 letter. The objection was that it's duplicative. We couldn't
2 find it elsewhere, so we don't think it's duplicative. But I
3 misrepresented it, it has not been entered into evidence yet.
4 So we would move it into evidence.

5 THE COURT: Thank you. Any objections? Let's just
6 restate for the record what Exhibit 94 is.

7 MR. HAMILTON: Is -- Exhibit 94, Your Honor, is the
8 commitment fee letter that is executed by both Barclays and by
9 Mr. Orr on behalf of the City of Detroit.

10 THE COURT: Thank you. Any objections?

11 MR. MARRIOTT: I want to just clarify the commitment
12 fee letter, or the commitment letter?

13 MR. HAMILTON: It's titled commitment letter. The
14 fee letter is a separate document.

15 MR. MARRIOTT: Right. Okay, I just wanted to
16 clarify. No objection.

17 THE COURT: It is admitted.

18 (City's Exhibit 94 was admitted)

19 Q Mr. Doak, can you explain to the Court why the city
20 ultimately decided to select Barclays over all the other
21 potential lenders? What's -- what's advantageous about the
22 Barclays financing facility?

23 A The -- the Barclays facility was advantageous over the
24 others because it presented the city with the best overall

25 economics and it was a -- and it was a fully underwritten

1 commitment by a major financial institution that we felt
2 confident would be able to complete the transaction.

3 In addition the other terms that Barclays negotiated for
4 in our process were ones that we felt we were capable of
5 performing -- performing on in the time allotted. That
6 includes the collateral provisions that they -- that they
7 requested.

8 Q What was particularly attractive about the collateral
9 provisions in the Barclays financing proposal that you
10 ultimately were able to negotiate?

11 A The -- the Barclays proposal worked with the indicative
12 term sheet that we provided and was -- and they were willing
13 to move forward with the -- the limited collateral interest
14 that we suggested that the lenders would receive on gaming
15 revenue and income tax revenue.

16 The other proposals that we received most -- all the
17 other proposals were -- were much more complex in regards to
18 what collateral interest parties were looking for.

19 Q And under the Barclays proposal that you were able to
20 negotiate, what happens with respect to the collateral if the
21 city is unable to get exit financing and the city ends up
22 defaulting at the end of the term of this loan?

23 A The -- Barclays has limited rights under the documents to
24 -- to utilize up to \$4,000,000 a month of gaming tax revenues

1 interest and amortize their position down. They -- they don't
2 have -- they don't have more expansive rights to the tax
3 streams of the city.

4 Q So they can't -- can Barclays if -- if the city defaults,
5 can Barclays demand immediate payment of the entire
6 outstanding balance in full and collect the collateral to do
7 that?

8 A No, that's -- that's not within their rights under the
9 documents.

10 Q All right. And is the city confident that in the event
11 it defaults, can't obtain exit financing, it will be able to
12 afford the amortized pay down of the loan in a default status
13 going forward?

14 A It will require some very difficult choices, but the --
15 but the city is -- is confident that it can -- it can still
16 operate and perform under those terms.

17 Q If I could ask you, sir, now to look at City Exhibit 98.

18 MR. HAMILTON: And again, Your Honor, this is a
19 document that is -- that is already in evidence because it was
20 not objected to.

21 Q Mr. -- Mr. Doak, can you tell us what this document is?

22 A This is the submission of the post-petition financing to
23 -- to the city council.

24 Q Was this document in fact -- and its attachments provided
25 to the city council?

1 A Yes, it was.

2 Q Okay. And then if I could ask you, sir, what happened
3 after you submitted the -- the package that included the --
4 the financing proposal and the related letters? What happened
5 with respect to the city council after you submitted them?

6 A The city council requested a -- a briefing on the -- on
7 the post-petition financing, so we -- and we provided them
8 with a closed meeting briefing in the subsequent week.

9 Q And did you attend that meeting?

10 A Yes, I did.

11 Q And did you physically provide them with the dec that
12 they requested?

13 A Yes. We -- we provided them with briefing materials in
14 the context of that meeting.

15 Q All right. If I can ask you, sir, to look at City
16 Exhibit 91. What is this document?

17 A These are the briefing materials that we provided to city
18 council in their closed session on the afternoon of October
19 17th.

20 (City's Exhibit 91 was identified)

21 MR. HAMILTON: Okay. Your Honor, the -- the city
22 would move Exhibit 91 into evidence.

23 THE COURT: Any objections?

24 MR. MARRIOTT: Your Honor, no objection to admission

25 of this exhibit for purposes of indicating what was provided

1 to city council. There are projections on the back that we
2 lodged objections to yesterday as to their relevance and
3 whether they should be admitted for the truth of the material
4 information contained therein. But as to -- to the extent the
5 city, and I assume this is true, was using this exhibit for
6 purposes of showing what was provided to city council, no
7 objection.

8 THE COURT: Is that the purpose of the exhibit, sir?

9 MR. HAMILTON: That is correct, Your Honor.

10 THE COURT: All right. For that limited purpose,
11 Exhibit 91 is admitted.

12 (City's Exhibit 91 was admitted)

13 Q Mr. Doak, if you'll look at Page 6 of this dec. Under
14 the -- in the row that's got the heading of pricing, second
15 from the bottom. The second bullet refers to the market flex
16 provision, or market flex provisions. Do you see that?

17 A Yes.

18 Q What was -- what was discussed with council in the closed
19 session on the 17th regarding this -- this provision?

20 A We informed them that there was a -- there was a market
21 flex provision in the -- in the Barclays commitment that gave
22 Barclays the -- the flexibility within specific limits to
23 modify the -- the interest rate component of the -- the
24 financing in order to syndicate out a -- a given portion of
25 the overall loan.

25 A Yes, we did.

1 Q What happened after the closed session with city council?
2 What did city council do?

3 A City council provided us with a -- the staff provided us
4 with a list of questions that we had to respond to over the
5 weekend.

6 Q And after you responded to those questions what did the
7 council do?

8 A The council subsequently did not approve the -- the
9 post-petition financing.

10 Q Is city council approving -- is city council approval of
11 the facility a condition, a closing condition to the facility?

12 A No.

13 Q Do you have an understanding as to why it's not a
14 condition to closing?

15 A The state public law 436 provides for how the City of
16 Detroit operates in the -- in the installation of emergency
17 manager. And subsequent to a disapproval by city council
18 there is an opportunity for them to provide an alternative and
19 then from there there is a -- there is an emergency loan board
20 decision that can be made to determine what goes forward.

21 Q Mr. Doak, do you have an opinion as to whether based on
22 the process that you -- you employed and directed, whether or
23 not the post-petition financing facility that the city has
24 agreed to with Barclays, has been substantially and adequately
25 tested by the market?

1 A Yes, I do.

2 Q What is your opinion?

3 A My opinion is that the Barclays financing is the best
4 available to the city under present circumstances and it has
5 been adequately and appropriately tested by a robust
6 competitive and market based solicitation process.

7 Q And is it your opinion it's the best facility available
8 to the city even if the maximum market flex provision is --

9 THE COURT: Would you not ask a leading question on
10 this point?

11 MR. HAMILTON: Sure.

12 Q Do you have an opinion as to whether or not this facility
13 is the best available to the city even if the market flex
14 provision is fully implemented?

15 A Yes.

16 Q What is your opinion?

17 A My opinion is that even if the market flex provision is
18 fully executed, this is the -- this is the best available
19 financing to the city right now given the circumstances and we
20 have the benefit of knowing from a very competitive process of
21 soliciting a -- from a wide range of financing providers what
22 other economics and associated terms was available. And I'm
23 confident that even with market flex, no party was -- was
24 willing to provide comparative overall and better terms.

1 unsecured financing is available to the city in this Chapter 9
2 case?

3 A Yes, I do.

4 Q What's your opinion?

5 A My opinion is that unsecured financing is not available
6 to the City of Detroit at this time given its current
7 circumstances.

8 MR. HAMILTON: I have no further questions, Your
9 Honor.

10 CROSS EXAMINATION

11 BY MR. ARNAULT:

12 Q Good morning, Mr. Doak. How are you?

13 A Good morning.

14 Q Again, my name is Bill Arnault and I represent Syncora.
15 I'd like to begin by discussing the initial proposal that you
16 sent out to prospective lenders regarding the DIP financing.
17 So the initial proposal that you sent out contemplated that
18 the DIP financing would be secured, correct?

19 A Yes.

20 Q And the collateral that the city included in its initial
21 proposal was income tax revenue, asset proceeds, and the
22 casino revenues, correct?

23 A Yes.

24 Q And you would agree with me -- agree with me that it

25 would be unlikely that a potential lender would remove

1 protections that went out with the city's initial proposal,
2 right?

3 A I would agree.

4 Q And as part of this solicitation process, you did not
5 send out a solicitation document that asked parties to return
6 bids for unsecured financing, right?

7 A No, we did not.

8 Q And you did not personally ask any prospective lender if
9 it would make the DIP loan on an unsecured basis, right?

10 A I did not ask that particular question.

11 Q Now yesterday on direct you testified that you had some
12 discussions with potential lenders before you filed for
13 bankruptcy. Do you remember that testimony?

14 A Yes.

15 Q And you testified that you had conversations with
16 Deutsche Bank, Wells Fargo, Citibank, and JP Morgan, right?

17 A That's correct.

18 Q And as we learned yesterday as part of these discussions,
19 you identified four distinct revenue streams that could be
20 used as security to secure any potential lending facility,
21 right?

22 A Yes.

23 Q I'd now like to move to your discussions with the city
24 council regarding the Barclays DIP. As you testified earlier,
25 the Barclays DIP is subject to market flex, right?

1 A Yes.

2 Q And as part of this market flex provision, the libor
3 floor can flex up from 1% to 2%, right?

4 A That's correct.

5 Q And the spread over libor can flex up from 2.5% to 4.5%,
6 right?

7 A Yes.

8 Q So the minimum interest rate on the DIP loan could go as
9 high as 6.5%, right?

10 A Yes.

11 Q And as part of the fee letter, Barclays has what is
12 defined as a successful syndication target, isn't that right?

13 A That's correct.

14 Q And the terms in the market flex provision allow them to
15 reset the interest rate on the entire loan within the market
16 flex parameters, right?

17 A Yes, under particular conditions.

18 Q So for example if Barclays discovers that the only
19 interested takers of the loan are willing to loan -- or
20 willing to take it at 5%, the portion of the loan that is also
21 retained by Barclays also resets to 5%, right?

22 A If they retained that portion of the loan, yes.

23 Q Okay. And the Barclays DIP also contains a commitment
24 fee, isn't that right?

25 A Yes.

1 Q And the commitment fee is due regardless of whether or
2 not this deal ever closes, right?

3 A Yes.

4 Q And you've already paid half of this commitment fee,
5 correct?

6 A No, we've paid all of it.

7 Q Okay. Okay. And the terms of the market flex provision
8 and the commitment fee are set forth in the fee letter,
9 correct?

10 A Yes.

11 Q And of course the market flex and the commitment fees
12 impact the ultimate cost of the Barclays DIP, right?

13 A Yes.

14 Q And when you were evaluating the various proposals, one
15 of the items that you evaluated was the interest rate, right?

16 A Yes.

17 Q So interest rate is a factor in evaluating the
18 attractiveness of a particular loan, correct?

19 A Yes.

20 Q And you would agree with me that pricing was an important
21 factor when you were evaluating the various proposals, right?

22 A Yes, it was.

23 Q In fact you would not have been in a position to
24 recommend the transaction to Mr. Orr if you were not aware of

25 the specifics of the market flex provision, right?

1 A I think that's correct, yes.

2 Q Now as you've testified, you said that you eventually
3 submitted the Barclays proposal to city council, right?

4 A Yes.

5 Q And under PA 436, if the city council disapproved the
6 Barclays DIP, it then had seven days to submit an alternative
7 proposal that would yield substantially the same financial
8 result or even a better one, right?

9 A I -- I don't think that's how 436 is written. They have
10 seven days to submit an alternative proposal.

11 Q That would yield substantially the same financial result?

12 A That's not how 436 is written. They have seven days to
13 submit an alternative proposal.

14 Q And after you submitted the proposal you had several
15 discussions with the city council members, correct?

16 A I have -- I'm a little lost on the chronology. Could --
17 could you provide some --

18 Q Sure, sure, sure. So after you submitted the proposal to
19 the city council, you had several discussions with city
20 council members, correct?

21 A No.

22 Q You didn't have any discussions with city council members
23 after you submitted the proposal to the city council?

24 A After we submitted the executed commitment letter to

25 council we had a closed door session with the city council in
13-53846-SW Doc 22-80 Filed 12/20/13 Entered 12/20/13 21:20:33 Page 40 of 128 486
574

1 full.

2 Q And this is a closed door session, correct?

3 A Yes.

4 Q So it was not subject to the Open Meetings Act, correct?

5 A Well, I -- I'm not familiar with every aspect of the Open
6 Meetings Act, but my understanding was that because this was
7 associated with litigation on a number of levels, the city
8 council and their legal advisors determined that a closed
9 meeting was appropriate.

10 Q Okay. And at this closed meeting, the substance of the
11 market flex provision was not provided to the city council,
12 right?

13 A No, it was not.

14 Q I'm sorry. It was not provided, correct?

15 A That's correct.

16 Q Okay. But isn't it true that after you had this closed
17 door meeting that the city council had additional questions
18 about the key terms of the Barclays DIP?

19 A The staff provided us with a list of questions that they
20 asked Jones, Day and Miller, Buckfire to answer.

21 Q Okay. And if we could turn to Syncora Exhibit 233.

22 MR. ARNAULT: I believe this has already been
23 admitted into evidence. Can we bring it up, please?

24 Q Now Syncora Exhibit 233 is an October 20th, 2013 email
25 attaching responses to questions for the city council,

1 correct?

2 A Yes.

3 Q And you are a recipient of this email, right?

4 A Yes.

5 Q And this document contains responses to the city
6 council's inquiries regarding the post-petition financing,
7 correct?

8 A Yes.

9 Q If we could turn to Page 7 of this document, please.

10 Sorry, next page, please. Yeah. And if we look at question
11 13, you'll see that the city council asked whether there are
12 any other key terms that the city council should be aware of.
13 Do you see that?

14 A Yes.

15 Q And in response the city notes that the primary terms of
16 the financing are in the term sheets, correct?

17 A Yes.

18 Q And the city notes the existence of market flex but does
19 not actually disclose the specific terms of the market flex,
20 correct?

21 A Yes.

22 Q Now, Mr. Doak, on redirect -- or on direct, you were
23 asked why you did not disclose the terms of the market flex to
24 the city council. And you stated that you did not want the
25 terms to get out into the market, correct?

1 A That's correct.

2 Q But I think as we established, this was actually a closed
3 door meeting, correct?

4 A That's correct.

5 Q Can we bring up Exhibit 94, please? I believe this has
6 also been admitted into evidence. City Exhibit 94 please.
7 This is the commitment letter with Barclays, correct?

8 A Yes.

9 Q And this document actually sets forth the conditions
10 under which you may disclose the fee letter, right?

11 A Yes.

12 Q And if we could turn to Page 6, please. And if you'll
13 look at Section 8, that actually set forth the conditions
14 under which you may share the commitment letter and the fee
15 letter, correct?

16 A Yes.

17 Q And little (I) there, states that the commitment and fee
18 letters may be disclosed to the City of Detroit's agents,
19 representatives, officers, directors, and advisors on a need
20 to know basis to the extent you notify such persons of this
21 obligation to keep those documents confidential, correct?

22 A Yes.

23 Q And the section also states that the fee letter may be
24 disclosed to the extent required pursuant to applicable law,

25 including any disclosures required to be made to the city

1 council, correct?

2 A It doesn't say that. What --

3 Q I think we go to the next page, please. Yeah, right at
4 the top there.

5 And we see notwithstanding any of the foregoing with
6 respect to any disclosures regarding the commitment letter or
7 the fee letter to the city council or any local emergency
8 financial assistance loan board as may be required under
9 Michigan PA 436, or Section 36(a) of the Michigan Home Rule
10 Act, correct?

11 A Okay.

12 Q Okay. And you would agree with me that the city council
13 are duly elected representatives of the City of Detroit,
14 correct?

15 A They are -- they are -- yes. They're -- well, I can't
16 tell you exactly how they fit into the architecture of
17 governance under 436 at this point, but they're certainly
18 elected individuals into the city council provisions.

19 Q Sure. Okay. Moving along, have you ever used the -- the
20 forward libor curve to take the swaps all the way out to
21 completion?

22 A I think you're asking have I looked at the libor curve
23 and understand what the implications are and in regards to the
24 size of payments throughout the entire remaining life,

25 technical life of the swap.

1 Q Yes.

2 A So I have an understanding of that.

3 Q Okay. And have you -- have you -- have you done that?

4 A I -- I -- I have not performed the -- the mathematics.

5 We have others on our team that have.

6 Q But you have an understanding of what that shows?

7 A Yes.

8 Q Similarly with respect to the -- the DIP financing, have
9 you done the same thing? Have you used the forward libor
10 curve to take -- to take that all the way out?

11 A Yes.

12 Q Okay. And have you compared the two results, the swaps
13 versus the DIP financing to see what that shows?

14 A No.

15 Q No. So you don't know whether the net present cost of
16 the swaps is actually lower than the net present cost of the
17 DIP financing?

18 A No, I'm -- I think there's a couple problems with your
19 question. Because as it stands the swaps are in default right
20 now. So I would -- I would challenge the assumption that you
21 should be looking at the swaps as if they will exist in their
22 current position in place over the next 20 to -- 20 to 30
23 years. And we -- but we do know that the mark to market
24 liability, the net present value of those -- that swap

1 \$290,000,000 in -- in recent times looking at the libor curve.

2 The economic cost of the swap termination portion of the
3 loan is significantly lower because the principal balance of
4 the loan will be 25 to 18% less and in addition the -- the
5 near term cost on a month to month basis is lower.

6 Q Okay. So it sounds like you haven't actually compared --
7 I mean it sounds like you haven't actually compared whether
8 the net present cost of the swaps is lower over time than the
9 net present cost of the DIP financing, is that right?

10 A Based on --

11 Q Assuming that the swaps are not terminated.

12 A Well, the swaps are in default so one would -- one would
13 have to -- one would have to question how -- whether that
14 would be an appropriate analysis to perform.

15 Q But it's not an analysis that you performed, correct?

16 A We -- it's -- that is not a particular analysis that --
17 that I had performed. We do know what the overall economic
18 cost is of the swaps to the end of the life. Effectively
19 that's the mark to market liability.

20 MR. ARNAULT: Okay. No further questions, Your
21 Honor.

22 CROSS EXAMINATION

23 BY MR. MARRIOTT:

24 Q Good morning, Mr. Doak.

25 A Good morning.

1 Q Vince Marriott of Ballard, Spahr representing EEPK and
2 affiliates. I have just a few questions for you. You
3 indicated in your response to previous questions that you did
4 not personally call any potential post-petition lender to ask
5 if they would provide to the city unsecured credit, correct?

6 A Yes.

7 Q Yes, that's correct?

8 A Yes, that -- that's correct. That would not --

9 Q I just want to make sure the answer doesn't come in
10 ambiguously.

11 A Okay.

12 Q My understanding is that you led the efforts of the city
13 to find post-petition financing, correct?

14 A Yes, I executed most of the activities and -- and led the
15 process.

16 Q Okay. Did you direct anybody else to contact a
17 prospective lender or lenders to ask if they would provide to
18 the city unsecured credit?

19 A No, I did not.

20 Q Did anybody do that anyway and report to you the answer?

21 A Not to my knowledge, no.

22 Q If we could bring up briefly City 90.

23 THE COURT: I'm sorry, sir, what number?

24 MR. MARRIOTT: I'm sorry, City 90.

25 Q And if we could turn to the -- well, the sixth page
13-53846-11 Doc 22-50 Filed 12/20/13 Entered 12/20/13 21:20:33 Page 47 of 128 493
574

1 including the cover page. Thank you. Now if I understood
2 your previous testimony, Mr. Doak, Exhibit 90 was a
3 presentation that you provided to the members of city council,
4 correct?

5 A Yes.

6 Q And these were the briefing materials from which you
7 spoke when you met with each of the city council members
8 individually?

9 A Yes.

10 Q And your testimony was that in the context of those
11 discussions, you did not indicate to members of city council
12 at least what the substance of any market flex provision would
13 be, but you did provide them with a range of interest rates
14 that could apply to the post-petition financing, is that
15 correct?

16 A That's correct.

17 Q And -- and that's what this page reflects, that range of
18 interest rates that you provided to them?

19 A Yes. This reflects a range of all end costs for the
20 facility.

21 Q Okay. And -- and it could run according to this chart
22 from a low of 5% up to 9%, correct?

23 A Yes.

24 Q So the range that you provided to them was one at the low

1 correct?

2 A Yes.

3 Q Now if we could turn to City Exhibit 89. And -- and
4 first let me just -- well, I understood your earlier
5 testimony, this presentation was provided to among others,
6 emergency manager Orr, correct?

7 A Yes.

8 Q And is it fair to say that this presentation was provided
9 to emergency manager Orr to assist him in evaluating the
10 relative merits of the four commitment letters that the city
11 received?

12 A Yes.

13 Q Okay. And if you would flip to the last page of this
14 exhibit. This is the all end cost analysis whereby the -- the
15 various potential costs of the facilities contemplated by
16 those four commitment letters, was provided to Mr. Orr,
17 correct?

18 A Yes.

19 Q With the contemplation that he would use this information
20 to assist him in deciding which if any of these commitment
21 letters to -- or the -- which of any of these commitments to
22 proceed with, correct?

23 A Yes. We -- we were not asking him to make a definitive
24 decision at that particular meeting. But this was to advise

25 him as to the comparative economics of the proposals at that

1 time.

2 Q Okay. Now in providing information to Mr. Orr, you
3 didn't provide a range of potential interest rates from 5 to
4 9%. You provided the actual potential interest rates, market
5 flex, and all under each of the commitments that the city had
6 in hand at that time, correct?

7 A Yes.

8 Q Would you have considered yourself adequately advising
9 him on the potential costs of these facilities if instead of
10 giving him the actual interest rates you just gave him a
11 range?

12 A No.

13 Q And I believe you also testified on direct that you gave
14 -- you gave two, unless I missed one, two principal reasons
15 for ultimately recommending the Barclays loan to Mr. Orr. The
16 first you gave was the best economics, correct?

17 A Yes.

18 Q Okay. And this last page of City 89, is a summary
19 depiction of the economics, correct?

20 A Yes, it is.

21 Q The second reason you gave if I heard you correctly was
22 that Barclays number one was undertaking to fully underwrite
23 the facility and they were an institution that could -- you
24 felt could close, correct?

25 A Yes.

5 A We -- we did, yeah. We -- the Barclays facility was the
6 best overall financing that the city had available given all
7 the elements of the commitment. The economics, the collateral
8 terms, the other lender protections, where they were willing,
9 where we resolved issues and associated with legal opinions,
10 it -- it was the best overall proposal that the city had
11 available.

13 | CROSS EXAMINATION

15 Q Good morning, Mr. Doak. I'm Jennifer Green on behalf of
16 the Retirement Systems for the City of Detroit.

18 Q As you understand it the funds related to the quality of
19 life note will be deposited in one lump sum, correct?

21 Q And those funds will be deposited into the city's general
22 fund account, not into a special re-investment account,
23 correct?

25 | into a -- an account that would be appropriately accounted for

1 as a general fund account, however, it most likely will be
2 deposited into a specific segregated bank account.

3 Q And the funds from the quality of life note are not
4 earmarked for a particular purpose though, correct?

5 A They are not earmarked for a particular purpose.

6 Q And you can't answer why the city will not commit to
7 using those proceeds for a particular purpose, correct?

8 A I -- I don't -- sorry, can you ask that question again?

9 Q You cannot answer why the city will not commit to using
10 the proceeds for a particular purpose, correct?

11 A I -- I can provide you an answer.

12 Q What's that?

13 A I think the -- the -- the number of different projects
14 and revitalization needs that the city has right now are --
15 are extensive and I believe that there is some flexibility
16 that's desired by the -- by the leadership team to deploy the
17 capital in the most efficacious purposes. And those
18 determinations will most likely be made on a real time basis.

19 Q Mr. Doak, do you remember being -- being deposed on
20 December 5th of 2013?

21 A Yes.

22 MR. HAMILTON: Your Honor, I'm going to object to
23 the relevance of this whole line of inquiry. I believe you
24 ruled on Friday this isn't relevant.

1 what I was looking for, that's why I'm bringing up his
2 deposition. He answered differently at his deposition.
3 That's -- that's why. I'm not going into the --

4 THE COURT: So you want to impeach him on an
5 irrelevant point?

6 MS. GREEN: No. I -- I -- I didn't think he was
7 going to answer with the purpose. He said something different
8 about where the funds were going to be deposited in general.
9 I didn't expect him to say anything about the re-investment
10 structure.

11 THE COURT: Why do we care where the funds will be
12 deposited?

13 MS. GREEN: Pardon me?

14 THE COURT: I'm sorry. Where do we care about where
15 the funds will deposited?

16 MS. GREEN: He testified previously that they would
17 be deposited into the general fund and that they would not be
18 earmarked for any particular re-investment purpose.

19 THE COURT: Right. Why do we care about that?

20 MS. GREEN: It's not related to what I take his
21 objection to be. Under the city's proposed order, they are
22 asking for certain findings of fact and conclusions of law
23 relating to the validity of the collateral with respect to the
24 quality of life note.

1 several parties have objected to the legality of that
2 collateral. In order to find -- for this Court to find that
3 that collateral is a valid pledge, I believe that the use of
4 the proceeds for proceeds approved under the gaming act is
5 still a relevant issue, setting aside what the objection is.
6 And I think I understand his is to be more limited than the
7 purpose I'm seeking it for.

8 MR. HAMILTON: I withdraw the objection, Your Honor,
9 if that's the purpose.

10 THE COURT: Well, but I -- I would suggest to you
11 that you get to that rather than worry about what specific
12 bank account it happens to land in.

13 MS. GREEN: But I didn't expect the answer. I
14 expected something different, Your Honor.

15 THE COURT: All right.

16 Q Mr. Doak, do you remember being deposed on December 5th?

17 A Yes.

18 Q Can you pull up Exhibit 236, please? Page 187. It
19 actually starts on Page 186 at the bottom. At Line 22, Mr.
20 Doak, if the post-petition financing is approved, is my
21 understanding correct that the city will receive the proceeds
22 as a part of one lump sum? Yes, that's correct. Do you
23 recall that testimony?

24 A Yes.

1 is your understanding of what will happen to the remainder of
2 those funds? The aspect that is the quality of life note,
3 what will happen to that lump sum? That will be deposited in
4 the city's general fund. Do you recall that testimony?

5 A Yes.

6 Q And on Page 188. So as part of the general fund, is it
7 fair to say that those quality of life proceeds are not
8 earmarked for any particular purpose? Object to form. You
9 stated they will -- the proceeds will not be placed to the
10 best of my knowledge in a segregated account and that the
11 spending will occur as I understand it, is not going to be
12 from a segregated account. Do you recall that testimony?

13 A Yes.

14 Q Okay. And the concept of calling it a quality of life
15 note, was the idea --

16 A Would you like to know why the answer is changed?

17 Q Sure, why is your answer different today than it was a
18 week ago?

19 A We've -- we've had subsequent negotiations with one of
20 the objectors, NPFG and we've also had discussions with the
21 city in regards to how the city is going to be administrating
22 the quality of use funds. There is now in the latest version
23 of the order, some understanding as to how the city will be
24 attempting to track how the proceeds are used and report back

25 to key stakeholders on a monthly basis.

1 I'm also aware of dialogues between Conway, MacKenzie and
2 other city officials in regards to how they want to think
3 about using the funds and they have indicated it's
4 administratively easier for them to potentially track it in a
5 separate account.

6 Q For clarification purposes, let's pull up the latest
7 order so you can clarify which portion of the order you are
8 referring to.

9 A I -- I'm not -- sure.

10 Q Okay. Can I direct your attention to the first page. Do
11 you recognize this order as being the one that has recently
12 been amended? The date is at the bottom.

13 A So this -- this looks like it's the 16th at 6:10. And I
14 don't know whether the negotiation with NPMFG was completed by
15 that. In fact I'm -- I'm pretty sure it may not have entered
16 into this particular version of the order.

17 Q So subsequent to this order, you have re-negotiated a
18 term relating to the use of the proceeds?

19 A No. Just how we are going to provide some information
20 and reporting on what we're -- on -- on how we're going to be
21 tracking the -- tracking the spending.

22 Q Can I direct your attention to Page 7? (ii), use of the
23 proceeds of the post-petition facility. Is that paragraph
24 consistent with the negotiation and the amendment that you

25 just referenced?

1 A Yes.

2 Q Okay. So this is the negotiation that you just
3 referenced with NPFG?

4 A No.

5 Q No. So I'm just trying to clarify. This order does or
6 does not contain the subsequent negotiations and the resulting
7 amendment that you are referencing?

8 A Given the -- given the time stamp on it, I -- I don't
9 know if it does. I don't believe it does. And once again
10 that is -- this is related to a -- a reporting or information
11 -- subsequent information providing requirement to the -- to
12 stakeholders.

13 I -- I don't know if the order itself is going to include
14 a particular provision in regards to what bank accounts are
15 used. That's my -- my information there is based on dialogue
16 that I've had with city officials and advisors.

17 MS. GREEN: I'll move on, Your Honor, except that
18 we've all been tailoring our cross examinations based on the
19 details in the proposed order. This one was filed just two
20 days ago, so we've all been using that as our template.

21 And if there is a purpose of the quality of life note
22 that's been injected back into the case, we may have further
23 questions. I'm just not sure at this time.

24 THE COURT: Well, let's just inquire. Is there a
25 later version of the proposed order than this one?

1 MR. HAMILTON: I believe -- I think this is the
2 current one, Your Honor. I think it's Paragraph 18 is what
3 she meant to be looking at.

4 THE COURT: Eighteen?

5 MR. HAMILTON: Eighteen.

6 MS. GREEN: So there, just to clarify, there is not
7 another order that will be filed after this.

8 MR. HAMILTON: There was a -- a typo that we found
9 that we need to correct, but substantively this is the current
10 state of the -- of the order.

11 MS. GREEN: Thank you.

12 Q And back to the quality of life note. The concept for
13 calling it a quality of life note was an idea by a -- an
14 attorney for the City of Detroit, correct?

15 A That the name first appeared in a document -- in a
16 document that was drafted by Jones, Day.

17 Q Okay. And this phrase, quality of life, originated in
18 mid to late August of this year, correct?

19 A Yes.

20 Q And it was after the objections to the forbearance
21 agreement and the assumption motion were filed in mid-August?

22 A I -- I don't know the timing of the objections, but that
23 would --

24 Q After August 16th?

25 A Yes.

1 Q Okay. And this terminology was used in response to
2 concerns related to the Michigan Gaming Revenue Control Act,
3 correct?

4 A This terminology was used because it appropriately
5 reflected the -- how the funds would be deployed.

6 Q Well, you had discussions about the Gaming Control Act
7 while you were developing the term sheet, correct?

8 A Yes.

9 Q And you incorporated ideas from those discussions when
10 you were formulating the purpose for which the quality of life
11 proceeds could be used, correct?

12 A Could you state that again?

13 Q You incorporated certain ideas from these discussions
14 when you were formulating the purpose for which the quality of
15 life proceeds would be used, correct?

16 A I -- I -- I believe that's accurate, but I -- I'm not
17 quite sure about the concept of formulating the purpose. But,
18 okay. I -- I didn't formulate a -- a purpose. I formulated a
19 construction of the -- the term sheet.

20 Q And you decided to call the loan that was not going to be
21 used to pay off the swaps, the quality of life loan in August
22 as we established. But your first awareness of the Michigan
23 Gaming Act was actually back in June, correct, during
24 negotiations by the swap counter parties?

25 A Yes.

1 Q So you're generally familiar, or were familiar with the
2 notion that there are limitations on the use of casino revenue
3 under Michigan law?

4 A Yes.

5 Q And as you were drafting the term sheet you purposely
6 structured it so that different collateral would secure the
7 quality of life note versus the way that the swap note would
8 be collateralized, correct?

9 A Yes.

10 Q And you only offered the casino revenue for the quality
11 of life note collateral because you thought that it would be
12 less controversial given that the marketplace was aware of the
13 arguments that had been made in connection with the assumption
14 motion that had been filed, correct?

15 A Yes.

16 Q And in fact even with this collateral structure that you
17 came up with, some potential lenders still had concerns
18 regarding the casino revenue being used as collateral,
19 correct?

20 A Yes.

21 Q And I think that you just testified they were concerned
22 about the collateral with respect to both federal and state
23 law, correct?

24 A Lenders were concerned about how their collateral

25 interest would be structured and formalized, both in the

1 context of state law and in the context of federal law.

2 Q Okay. And city council also had concerns with using the
3 casino revenue as collateral due to the gaming act, correct?

4 A I don't know whether I could affirm that statement. City
5 council, various city council members voiced their concern in
6 regards to the use of gaming tax revenues in the first place
7 in regards to some of the transactions in -- in 2009.

8 Q Do you remember meeting with someone named Irv Corley,
9 the executive policy manager of the city council's policy
10 division?

11 A Yes.

12 Q Do you remember this concern about the collateral and the
13 casino revenue being raised by Mr. Corley during that meeting?

14 A It most likely was.

15 Q Okay. Can you pull up Exhibit 233? And you recognize
16 these. You asked about these earlier. These are the
17 questions that were sent to you from city council? Well, this
18 is the cover email, but attached to this are the questions?

19 A Yes. This is the Q and A that was provided back to the
20 city council.

21 Q Okay. And this -- this casino revenue collateral issue
22 was also raised by the city council in their written questions
23 to you?

24 A It -- it most likely -- likely was.

25 Q Okay.

1 A This was a set of questions prepared by city council
2 staff.

3 Q Okay.

4 A So I -- I can't tell you whether it was actually the city
5 council that raised this.

6 Q Fair enough. Can I direct your attention to Page 6,
7 Question 9? Question 9 states, under MCL 432.212, do you
8 understand that that's the Michigan Gaming Act, a reference to
9 that?

10 A Okay.

11 Q It lists the restrictions on the use of wagering taxes.
12 Which category allows the use of wagering taxes to secure the
13 swaps or the proposed financing? The response was, with
14 respect to the swaps, the swap counter parties have made
15 certain legal arguments in support of the pledge of wagering
16 taxes which speak for themselves.

17 In connection with the proposed post-petition financing,
18 the city intends to rely on the Federal Bankruptcy Code to
19 authorize the pledge of collateral including the wagering
20 taxes. Did you -- did you work on this response to this
21 particular question?

22 A I did not work on this response.

23 Q But you understand that the city council's question was
24 what purpose under Michigan law and under which category of
25 the gaming act the casino revenue would be used for, correct?

1 MR. HAMILTON: Your Honor, at this point I think
2 we're beyond the competence of the -- of the witness to
3 answer. He didn't work on this portion of this unit.

4 THE COURT: The objection is sustained.

5 Q Do you know who did prepare the responses to the
6 questions raised by city council?

7 A Yes.

8 Q And who prepared these responses?

9 A Two attorneys from Jones, Day.

10 Q Okay. You would agree with me that based on the plain
11 language of the answer since I will not be cross examining an
12 attorney from Jones, Day, that there is no use listed in the
13 response under Michigan law specifically referencing the
14 gaming act?

15 MR. HAMILTON: Object, Your Honor. It's calling
16 for --

17 THE COURT: The objection is sustained. You -- you
18 can argue that, but --

19 MS. GREEN: I'll move on.

20 Q The city council, I believe we already established they
21 were not given a copy of the fee letter?

22 A That's correct.

23 Q And you admit that fees are important to you in analyzing
24 the transaction, correct?

25 A Yes.

1 Q I believe you were already asked this question about the
2 market flex provision, but I don't know that anyone asked this
3 with respect to the fees. If you didn't know the amount of
4 the fees associated with the loan, do you agree with me that
5 you would not be in a position to recommend the \$350,000,000
6 financing to the city?

7 A I -- I would agree with you.

8 Q Okay. Can we pull up Exhibit 1003? Mr. Doak, do you
9 recognize this email dated August 29th, 2013? Or it might be
10 August 30th, there's two.

11 (Retirement Systems Exhibit 1003 was identified)

12 A I -- I --

13 Q Can you pull up the -- the paragraph below it? The body
14 of the email.

15 A It -- it looks that -- that looks like the letters that
16 -- email and correspondence we were sending to many of the
17 potential lenders.

18 Q Okay. And the to and from portion of the email states
19 that it's an email from you to Bruce Mendelson at Goldman
20 Sachs?

21 A Yes.

22 Q And Goldman Sachs was a potential lender with respect to
23 the post-petition financing, correct?

24 A Yes.

1 paragraph of the email. It says Jim, thank you for sending
2 the information over. We've begun our work and are far along
3 in clearing our internal conflict system. Is there a data
4 room that you were planning on making available or should we
5 provide a list of diligent questions. Do you remember this
6 email?

7 A Not -- not this particular email, but I -- that looks
8 completely consistent with what he might have written to me.

9 Q And with the work that you were doing to prepare the
10 information that the lenders would need, correct?

11 A Yes.

12 Q And your response to him, if we could go to the email
13 directly above that. Hold off on the due diligence, we have a
14 data room and there's a liquidity piece under development.
15 You did not call the liquidity piece a quality of life
16 improvement piece to Mr. Mendelson, did you?

17 A No. That reference, a liquidity piece under development
18 is a reference to the -- the monthly cash flow liquidity
19 forecast that we subsequently provided to all of the potential
20 lenders that signed the NDA.

21 Q Okay. Can we also look at email Exhibit 1005? At the
22 bottom portion dated August 29th, it's an email from you. Do
23 you recognize that email?

24 (Retirement Systems Exhibit 1005 was identified)

25 A Yes.

1 Q And is this another solicitation email to a prospective
2 lender?

3 A Yes. In a -- yes, it is.

4 Q And Mr. Gavin is an investment banker at RW Baird,
5 correct?

6 A Yes, he is.

7 Q And you were reaching out to him as a potential source
8 for the post-petition financing?

9 A Yes. We -- we -- we were reaching out to RW Baird to see
10 whether they wanted to look at the financing opportunity.

11 Q And the email states exactly that, we're working on
12 sourcing 350,000,000 post-petition financing for the city, use
13 of proceeds is to financing the swap termination and provide
14 general fund liquidity through the Chapter 9 case. Do you see
15 that portion?

16 A Yes.

17 Q And that's not relating to the liquidity forecast,
18 correct? That's the actual purpose of -- of the use of the
19 proceeds?

20 A Yes. This was sent to him to get a quick understanding
21 as to whether RW Baird wanted to be incorporated into the
22 process and receive the formal invitation.

23 Q And you also had a conversation with Mr. Gavin relating
24 to the potential post-petition financing shortly after this

25 email, correct?

1 A Yes.

2 Q And in this conversation he told you -- let's go to the
3 next portion of the email, please. The top of the email it
4 says when we spoke I said the counter parties didn't get a
5 bankruptcy opinion. Is he referring to the phone conversation
6 that you had?

7 A Yes, he is.

8 Q Okay. Further down in the second paragraph as I said on
9 the phone, the counter parties' attorneys did not believe that
10 the pledge survived, but they did what they could get from
11 Oreck. And attached to this email was a legal opinion from
12 Oreck, correct?

13 MR. HAMILTON: Your Honor, at this point I think
14 we're talking about double hearsay about what somebody who's
15 not in Court said, somebody else who is not in Court said. I
16 would object on that ground on this portion of the email.

17 THE COURT: Well, excuse me again. Is this exhibit
18 in evidence?

19 MS. GREEN: Not yet. I was going to move for its
20 admission after we established certain things relating --

21 THE COURT: Okay. Again, it's not proper to ask a
22 witness about the content of a document until it is in
23 evidence. So on that ground the objection is sustained.

24 MS. GREEN: Your Honor, I would move for the

25 admission of Exhibit 1005.

1 MR. HAMILTON: And, Your Honor, we would object to
2 the portion of the exhibit that contains the double hearsay,
3 the portion that's actually currently highlighted on the
4 screen. We don't object to the statements that this man made
5 to Mr. Doak in response to Mr. Doak's inquiries. But when
6 this man is -- if they're introducing what this man is saying
7 about what somebody else said that is -- has no relation to
8 the financing that's being sought, that's double hearsay and
9 should not come in.

10 MS. GREEN: May I respond? I will be using this
11 particular sentence for its affect on Mr. Doak and what he did
12 afterward, not to establish the truth of the email itself.
13 And so therefore I do not believe I'm using it for the truth
14 of the matter asserted and it's not hearsay.

15 THE COURT: For that very limited purpose, the Court
16 will overrule the objection and admit into evidence Exhibit
17 1005.

18 (Retirement Systems Exhibit 1005 was admitted)

19 MS. GREEN: And, Your Honor, I believe that my
20 Exhibit 1003 is already in evidence, the one that I asked him
21 about previously.

22 THE COURT: Would you like me to check for you?

23 MR. HAMILTON: No objection, Your Honor. We don't
24 object to it being admitted into evidence. It's not into
25 evidence yet, but we don't object.

1 THE COURT: 1003 is --

2 MS. GREEN: Right, Your Honor.

3 THE COURT: 1003, all right. 1003 is admitted.

4 (Retirement Systems Exhibit 1003 was admitted)

5 Q If we could pull the portion up that we had up a moment
6 ago. And attached to this email was a legal opinion from
7 Oreck, correct?

8 A Most likely.

9 Q And I think we established when we -- when you testified
10 at your deposition you didn't read the legal opinion, but you
11 knew that it was attached?

12 A Yes.

13 Q Okay. And that Oreck opinion, do you understand that
14 that's the same opinion that was attached to the collateral
15 agreement?

16 A I don't -- all I know is the Oreck opinion related to the
17 2009 swap amendment.

18 Q Fair enough. The portion that we read earlier, as I said
19 on the phone the counter parties' attorneys did not believe
20 that the pledge survived, but they did what they -- did get
21 what they could from Oreck. And to your knowledge this
22 information was gained through Mr. Gavin's role as a financial
23 advisor to the city in 2009, correct?

24 MR. HAMILTON: Again, I'm going to object now on

25 relevance grounds. This has nothing to do with the financing,
13-53846-SW Doc 22-89 Filed 12/20/13 Entered 12/20/13 21:20:33 Page 69 of 128 515
574

1 the post-petition financing facility. It's not within the
2 scope of his direct. I -- I don't see how this relates to the
3 post-petition financing facility.

4 MS. GREEN: Your Honor, I believe that it does
5 relate to the ability of the city to have potentially gotten a
6 better deal. Yesterday we heard evidence relating to the
7 city's poor bargaining position in relation to the forbearance
8 agreement. We heard that they had no leverage. The cards
9 were stacked against them.

10 I think that certain evidence tends to show that after
11 they entered into the agreement they learned information that
12 could have strengthened our case and I want to explore whether
13 this information was used to reconsider their position, to
14 investigate further, things of that nature.

15 THE COURT: This is arguable. I'll permit it. Go
16 ahead.

17 A Could you ask the question again, please?

18 Q Sure. Your understanding was that this knowledge was
19 gained by Mr. Gavin through his role as a financial advisor to
20 the city in 2009, correct?

21 A I have -- I have no knowledge and do not recall having
22 knowledge at the time as to whether Tom Gavin was or RW Baird
23 was an advisor to the city for the purposes of that
24 transaction.

1 financial advisor or consultant for the City of Detroit,
2 correct?

3 A His -- yes. His engagement as I understand it has been a
4 standing one related to the water fund and the sewer fund and
5 the debt of DWSD. I don't know what RW Baird's role was or if
6 they had a role with regards to the 2009 deal.

7 Q Okay. Rather than taking this down and pulling your
8 deposition up, I will read it so that we don't have to switch.
9 You recall being deposed on December 5th, correct?

10 A Yes.

11 Q Do you recall being asked a question about Mr. Baird and
12 your conversations and your knowledge of his involvement with
13 the City of Detroit?

14 MR. HAMILTON: Your Honor, could we at least have a
15 page reference so I can --

16 MS. GREEN: 215.

17 Q Do you recall testifying about that?

18 A I don't recall that particular -- I don't recall that
19 particular question, but I'm sure you asked it.

20 Q Do you recall testifying, "he had a recollection, meaning
21 Mr. Gavin, or at least a narrative in regards to the
22 negotiations that occurred amongst the parties in 2009 and he
23 was informing me of a dialogue that he indicated had occurred
24 in the negotiations between the city and its advisors, and the

25 swap counter parties and their advisors, in regard to

1 structuring the collateral agreement and the amendment to the
2 swaps"?

3 A Yes.

4 Q Does that change your answer as to whether or not you're
5 -- the context of your conversation was that he was a former
6 financial advisor during the 2009 negotiations?

7 A Absolutely not. I didn't know if that was firsthand,
8 secondhand, thirdhand, fourth hand, at the bar (Inaudible). I
9 -- I didn't know where he came up with this.

10 Q Okay. After you spoke to Mr. Gavin and you received this
11 email from him, you then forwarded this information to the
12 city's legal advisors, correct?

13 A Yes.

14 Q And why do you share it with -- why did you share it with
15 them?

16 A I shared it with them --

17 MR. HAMILTON: At this point I think we're getting
18 into privilege, Your Honor.

19 MS. GREEN: Perhaps, then I -- with that caveat, if
20 there's a non-privileged answer, I'll take it.

21 THE COURT: I don't know that we can rely on the
22 witness to know the difference.

23 Q Without disclosing any potentially attorney/client
24 privileged information, did you have a reason for forwarding

25 this email? If you can't answer it without disclosing that's

1 fine, sorry. Just --

2 A It seemed to be a pertinent conversation to make sure
3 that I was not the only person who was aware of this act that
4 my conversation had occurred.

5 Q Okay. And did you share it with the swap counter parties
6 as well?

7 A No.

8 Q Do you know if anyone from the city's team shared it with
9 the swap counter parties?

10 A No.

11 Q Did you do any further investigation as to whether Mr.
12 Gavin's statements were true?

13 A No.

14 Q Did you ask Mr. Gavin for the names of the individuals
15 that allegedly said these statements?

16 A No.

17 Q Did you look for any documents where the swap counter
18 parties may have made this admission -- admission in writing?

19 A No.

20 Q Did this information cause you in any way to reconsider
21 the deal that had previously been struck?

22 A In -- my focus at that particular point was on moving
23 forward with the post-petition financing and my area of focus
24 was not on the executed forbearance agreement and where it

25 would go from there.

1 Q Good point. Do you know if anyone else on the emergency
2 manager's team or perhaps your colleague Mr. Buckfire used
3 this information as leverage with the swap counter parties?

4 A I -- I don't know.

5 Q Do you know after you forwarded this information on to
6 others, do you know if anything was ever done with this
7 information in regards to due diligence that could be
8 performed to look into the story that you were told?

9 A I don't know.

10 Q Is it fair to say that this information didn't cause you
11 to re-think the strategy of seeking post-petition financing
12 versus litigating the underlying swap transactions?

13 A I -- I -- could you ask the question again? Because
14 I'm --

15 Q You just testified --

16 A Is it the whole city or -- or like we -- we had an
17 executed forbearance agreement that provided advantages to the
18 city and, you know, -- and -- and had, you know, various
19 obligations. And I was working on the -- the financing.

20 If there was to be a reverse of course on the direction
21 we were going on the forbearance optional termination
22 agreement, it would not have come from me.

23 Q Okay. There were continued negotiations though related
24 to the forbearance agreement after its initial execution date,

25 correct? Five amendments?

25 THE CLERK: All rise. Court is in session. Please

1 be seated.

2 (WITNESS JAMES DOAK RESUMED THE STAND AT 11:13 A.M.)

3 THE COURT: It appears everyone is present, let's
4 proceed. Everyone except Ms. Green.

5 MR. HACKNEY: I think Mr. Doak probably would like
6 to confirm that we're done with him, sir.

7 THE COURT: Okay.

8 MR. HAMILTON: No redirect, Your Honor.

9 THE COURT: All right. You're all set, sir.

10 A Okay.

11 (WITNESS JAMES DOAK WAS EXCUSED AT 11:14 A.M.)

12 MR. SHUMAKER: Good morning, Your Honor. Greg
13 Shumaker, Jones, Day for the City of Detroit. The city calls
14 Kevyn Orr to the stand.

15 THE COURT: While we have a moment, my latest count
16 is 243 minutes left for the city and 319 minutes left for the
17 objecting parties.

18 MS. GREEN: Thank you, Your Honor.

19 THE COURT: Please raise your right hand.

20 (WITNESS KEVYN ORR WAS SWORN)

21 THE COURT: Please sit down.

22 DIRECT EXAMINATION

23 BY MR. SHUMAKER:

24 Q Good morning.

25 A Good morning.

1 Q Would you please state your name for the record?

2 A Kevyn D. Orr.

3 Q What's your current position, Mr. Orr?

4 A Emergency manager, City of Detroit.

5 Q Mr. Orr, are you aware of a document or agreement known
6 as the forbearance and optional termination agreement?

7 A Yes.

8 Q I'm going to refer to it as the forbearance agreement
9 this morning, is that okay with you?

10 A Yes.

11 Q Okay. What was your role in the negotiation of the
12 forbearance agreement?

13 A I participated in the negotiations towards the end to
14 final we get to definitive terms.

15 Q Who led the business and legal negotiations for the city?

16 A On the business side, it would be Ken Buckfire, the
17 city's investment banker. And on the legal side attorneys at
18 Jones, Day.

19 Q Anyone in particular at Jones, Day?

20 A I believe Corinne Ball and Bruce Bennett.

21 Q Okay. Why did you have Mr. Buckfire take the lead on the
22 business negotiations?

23 A Mr. Buckfire is the city's investment banker of the
24 restructuring effort and had participated in these types of

25 negotiations and financial arrangements before.

1 Q And when did the -- the swap -- I'm sorry, when did the
2 negotiations relating to the forbearance agreement begin?

3 A I believe they began in late May throughout June. I
4 became involved in early June.

5 Q Okay. And why did you believe pursuing such an agreement
6 in the May, June time period was important?

7 A The city was flowing cash flow negative quite severely,
8 almost to the point that we would not have sufficient cash to
9 make -- meet obligations as they became due.

10 Q Were there any other concerns that you had with regard to
11 the city's position at that time?

12 A Sure. In addition to cash flow concerns, I was concerned
13 that we wouldn't be able to provide services to the city. And
14 that we also were at risk of being in default and might lose
15 access to the casino revenue.

16 Q Was there any concern about a termination payment under
17 the swaps?

18 A Yes. We have been in default and there was quite a large
19 termination payment that could be due as well.

20 Q Did you have a sense as to how much that termination
21 payment might be?

22 A At that time I had heard figures somewhere between
23 300,000,000 to 400,000,000.

24 Q What was your understanding of why the city was facing a
25 termination payment at that time?

1 A The -- the city had been in default for a number of
2 issues including the declaration of the emergency and the
3 appointment of an emergency manager. Obviously in the event
4 of default. And the swap counter parties had been forbearing
5 for some period of time, so the city was at risk at any given
6 time of being declared in default and those parties exercising
7 their remedies.

8 Q As you started out with these negotiations, what were
9 your objectives?

10 A Our objectives really were to get the best discount we
11 could over the termination fee that was due to relieve any
12 threat, to losing the casino revenue and to also to the extent
13 we could, reduce the risk of litigation so we could stabilize
14 the city's finances and go cash flow positive.

15 Q You talk about the cash. Any particular portion of the
16 city's cash that you were referring to, the casino revenues
17 has come up?

18 A Yes. Casino developer revenue, yes.

19 Q Okay. Why is access to the casino revenue so important
20 to the city?

21 A Casino revenue is the single most stable source of
22 revenue available to the city. And without it the city cannot
23 operate.

24 Q Could you summarize for the Court how the negotiations
25 progressed from your standpoint?

1 A Yes. They progressed at a pace in June and in
2 approximately the June 10th to June 14th time frame. They
3 became more critical. There were a number of different
4 sessions that I personally was involved with where
5 negotiations broke down and the parties would try again
6 ultimately reaching an agreement on June 12th or 13th, I
7 believe.

8 Q So you've mentioned that you got involved towards the
9 end. What -- what do you mean by that? You -- what did you
10 personally do?

11 A Well, the -- the negotiations were going forward
12 principally on the business side from Mr. Buckfire and on the
13 legal side with the attorneys at Jones, Day for some weeks
14 before I got involved. But personally I began to negotiate
15 what I hoped to be the best possible discount percentage that
16 we could get.

17 Q I want to talk a little bit -- ask you a few questions
18 about the -- the discount that you referred to. But focusing
19 right now on negotiations, and you said that Mr. Buckfire at
20 Miller, Buckfire, and Ms. Ball, and Mr. Bennett at Jones, Day,
21 how often did you communicate with them about negotiations
22 during this time frame?

23 A I -- I communicated either directly or indirectly
24 regularly throughout the June time frame with Mr. Buckfire for
25 a number of days. We actually sat in the same room and had

1 phone calls off and on several times a day.

2 Q Do you recall what the opening positions of the city and
3 the swap counter parties were?

4 A Yeah. Generally speaking the -- the city wanted to get
5 the maximum discount available, relieve itself of the threat
6 to the casino revenue, release any liens that might -- that
7 the parties have on that revenue. The swap counter parties
8 wanted to take the position that they were 100% secured and
9 wanted to recover their total amount due.

10 Q Do you recall what the city's opening position was?

11 A I recall that by the time I got involved the negotiations
12 were in the 80% range. And we -- we wanted to push to see if
13 we could get better.

14 Q Before you got to that position, how would you describe
15 the negotiations between the city and the swap counter
16 parties?

17 A My understanding that negotiations were arm's length.
18 They were robust. And they were quite contentious from time
19 to time.

20 Q Were you coming to an agreement easily?

21 A No, not at all.

22 Q Why did you think that was the case?

23 A Well, I -- I think the parties held very strong positions
24 on both sides.

25 Q You -- you mentioned the -- the events of default and

1 that you were an event of default yourself. How did those
2 events of -- of default affect the negotiations?

3 A Well, I -- I think the swap counter parties wanted to
4 press and -- and suggested that they knew we were in default,
5 so they wanted us to acknowledge that they were forbearing and
6 there was a value to that. We wanted to press that the city's
7 condition was quite dire. And while there were defaults, we
8 had been paying the obligations as they had become due, but
9 the risk to the city remained.

10 Q What did the -- an event of default allow the swap
11 counter parties to do?

12 A Well, it could have allowed them to trap the casino
13 revenue.

14 Q And you mentioned the termination payment as well?

15 A Yes.

16 Q Had the -- the swap counter parties attempted to trap the
17 casino revenues before this time?

18 A I don't believe so.

19 Q Did you --

20 THE COURT: Excuse me one second. I have to
21 interrupt. We just blew through what is probably the most
22 significant question in this trial which is what were the
23 arguments that the city was using to -- in support of its
24 request to get a discount on the termination fee.

1 I promise.

2 THE COURT: You're going to what?

3 MR. SHUMAKER: I am going to get there.

4 THE COURT: Okay.

5 MR. SHUMAKER: I was -- I was leading up to that.

6 THE COURT: Okay. So this was like a preview.

7 Okay. If -- if that's your plan, I will let you pursue it.

8 Otherwise, I was going to.

9 MR. SHUMAKER: Okay. Hopefully, I'll cover
10 everything that Your Honor is -- is interested in. And I do
11 recognize what Your Honor is interested in.

12 Q I believe my question was, Mr. Orr, was why did you think
13 at this time when the negotiations were going on, in the May,
14 June time frame, that the -- the swap counter parties might
15 trap the casino revenues when they hadn't previously?

16 A Well, there have been multiple events of default as I
17 have mentioned with me as well. And also to the extent there
18 were other litigation risks, it appeared that -- at least to
19 us, it appeared that the parties had come to sort of a head in
20 their respective positions.

21 We also could not operate on the basis that hope was a
22 strategy for stabilizing the city's finances given the
23 precarious nature that they were going into that we were
24 having a very significant financial crisis at the time. So

25 the concept that they would forbear indefinitely was not

1 reasonable.

2 Q And during this time were you -- fair to say that the --
3 the city was -- you started considering thinking about a
4 filing of bankruptcy for the city, correct?

5 A Yes, I think that's fair.

6 Q If you were -- if the -- if the possibility of a
7 bankruptcy filing was out there for you, why were you
8 concerned about the banks and the casino revenues?

9 A Well, I -- I believe in consultation with our attorneys,
10 there was a possibility that the swap counter parties wouldn't
11 be bound for several -- by several provisions of the
12 Bankruptcy Code by the automatic stay and would still be able
13 to exercise their security interest.

14 Q And do you -- do you recall the -- the provisions that --
15 that were coming into play?

16 A I don't have the Code in front of me, but I think
17 362(a)(17) and don't quote me on this, there are a lot of
18 attorneys, 546.

19 Q I'm not trying to quiz you. I -- is the --

20 A I just don't remember.

21 Q Is the term a safe harbor --

22 A Safe harbor provision, sure. There's the safe -- I'm
23 just -- I don't remember the specific Code provision.

24 Q Okay. And I'm sorry. What would the -- what would the
25 safe harbor have allowed the banks to do arguably?

1 A The safe harbor provision allows banks with -- with
2 interest of -- of this kind to execute on their security
3 interests.

4 Q Around this time of -- of negotiation, was there any
5 interruption in the negotiation process?

6 A Oh, sure, yeah.

7 Q And -- and who in your mind interrupted?

8 MR. HACKNEY: Your Honor, I'd like to interpose an
9 objection if I could. I think he's about to go down a pathway
10 that I construed the Court to have determined to be collateral
11 by excluding Ms. Schwartzman's testimony. This is about
12 Syncora and whether it impacted the negotiations that were
13 ongoing and I do think that this is a sufficiently collateral
14 matter that is just not relevant to the proceeding. But to
15 the extent we're going to delve into it, then it gets into the
16 sort of who said what to whom and why didn't various things
17 happen.

18 MR. SHUMAKER: Well, Your Honor, the importance of
19 the casino revenues and what Mr. Orr's testifying to is -- and
20 its critical importance was what Syncora was -- was up to and
21 that's why the witness' account of what the city -- how the
22 city approached that issue and what it might do and what it
23 did in order to protect those casino revenues is -- is
24 important.

1 Buckfire testified yesterday why he was also heavily involved,
2 to the extent they want to introduce testimony that Syncora
3 sought to trap the revenue and that impacted the desire to
4 conclude the negotiations, I don't have a problem with limited
5 testimony to that effect.

6 As you get into the temporary restraining order that was
7 obtained on an ex parte basis and whether that was
8 appropriately obtained, or whether we were sitting around
9 waiting for them to turn a confidentiality agreement to us,
10 all of the things that were in the testimony that we wanted to
11 introduce, I think you cross over to a point where it -- it
12 becomes prejudicial for us to have them tell their side of the
13 story and I do believe it's also -- I think it's collateral.

14 MR. SHUMAKER: And, Your Honor, I -- I don't plan on
15 going into this in any significant detail.

16 THE COURT: Well, I'll let you proceed with the
17 understanding that you are potentially opening up doors you
18 don't want to open. And I'll leave you to decide whether to
19 take that risk.

20 Q Let me switch to this, Mr. Orr. Let -- let me ask you,
21 when did you reach a final agreement with -- with the swap
22 counter parties?

23 A We reached an agreement in principal on June, I believe
24 it was June 13th and actually signed a document, I believe July

1 Q So how long did it take from -- from start to finish?

2 A Almost a month and a half approximately.

3 Q Now, in your view as the emergency manager, what benefits
4 does the forbearance agreement provide to the city?

5 A Well, it gives us access, unfettered access to the cash.
6 It gives us a significant discount over and above the par rate
7 of the termination fee. It helps us avoid costly and
8 expensive litigation which is a cost drain on the city.

9 Equally important is it helps stabilizes the city's finances
10 and also allows us an opportunity to get at some well needed
11 services to the citizens of the city.

12 Q Now, so is it fair to say that -- that in your view you
13 achieved your objectives that you started out with in
14 negotiating the forbearance agreement?

15 A Yes.

16 Q Now you talked a little bit about a discount on the
17 termination payment, correct? Do you recall what the original
18 discount percentages were that were negotiated under the
19 forbearance agreement?

20 A Yes.

21 Q And -- and what were they?

22 A The original percentages were -- I believe there was 82,
23 77, and 75.

24 Q And when you say 82, 77, and 75, what -- what do you

25 mean?

1 A There -- there was a -- a sliding scale related to how
2 quickly you could pay the discount and as you went by certain
3 time frames, the discount began to get reduced. So initially
4 if you paid it quickly it was 75%, if you paid it less quickly
5 it became 77%. And if you took out the entire term of the
6 agreement it went to 82%.

7 Q Okay. Now, there have been subsequent amendments to the
8 forbearance agreement, correct?

9 A Yes.

10 Q And the discount numbers have changed and the -- and the
11 date thresholds have changed, is that correct?

12 A Yes.

13 Q And what is your understanding of what the current
14 discount percentages are on the termination payment?

15 A I want to be clear when I say discount. It's the amount
16 that you have to pay. So the discount is actually 25%. And
17 when I say 82, it's actually 18%.

18 Q Right. What -- what are they right now? As we sit here
19 today December 18th, 2013?

20 A Twenty-five and 18%.

21 Q Okay. And do you know when the city must exercise its
22 rights under the agreement in order to get the 75%, by what
23 date?

24 A I think we need to exercise them by December 31st.

25 Q Now did you -- did you approve these discount

1 percentages?

2 A Yes.

3 Q How did you arrive at these percentages?

4 A It was subject to negotiation. We kept pressing and
5 testing how far we could go and they kept resisting and they
6 would hang up and we'd come back and press and test and
7 finally we got to the point where they said those are the
8 percentages that we're willing to accept.

9 If we don't accept those percentages we would not have a
10 deal. We pushed back and said, you know, we have to have 25%
11 because we felt that was a fair discount for a secured
12 interest.

13 Q Okay. Do you believe the city got a good deal with the
14 discount percentages that you approved?

15 A I believe we got the best deal available, yes.

16 Q Why?

17 A Well, as I said during the negotiations, they had broken
18 down several times, literally broken down. Phone calls were
19 hung up and the parties did not speak for several days. And
20 went up -- as I understand it went up to the highest levels of
21 the counter parties organization as far as what they were
22 willing to accept. And in fact we were prepared to
23 potentially pursue litigation if we had to.

24 Q I want to -- I want to focus on that in just a bit, but

1 question which is in connection with your negotiations, did
2 the swap counter parties ask you on behalf of the city to
3 reaffirm their swaps deal with the city?

4 A Yes.

5 Q Did they ask you to reaffirm their collateral rights with
6 regard to the casino revenues?

7 A Yes.

8 Q Did you agree to do so?

9 A No.

10 Q Why not?

11 A Well, we -- we felt there were issues with regard to
12 their rights and we don't want to affirm because we're in the
13 midst of negotiations and wanted to preserve our options if
14 those negotiations fell through.

15 Q During this time of the negotiations, were you looking at
16 the possibility of suing the swap counter parties?

17 A Yes.

18 Q Did you receive legal advice regarding the potential
19 claims the city might have against the swap counter parties?

20 A Yes.

21 Q From whom?

22 A From our attorneys.

23 Q Who were your attorneys? The law firms, how about that?

24 Okay.

25 A Attorneys at Jones, Day and also attorneys at Pepper,

1 Hamilton.

2 Q And that's Mr. Hertzberg at Pepper, Hamilton?

3 A Yes.

4 Q Why was Pepper, Hamilton involved?

5 A We had retained Pepper, Hamilton -- Pepper, Hamilton
6 because issues had been raised regarding a potential conflict
7 with Jones, Day and we didn't want to have any issues
8 regarding whether or not we were pursuing potentially any
9 claims against the swap counter parties zealously.

10 Q Now were -- were the Jones, Day lawyers and -- and the
11 Pepper, Hamilton lawyers involved in the meetings and
12 communications with the swap counter parties while you were
13 negotiating the agreement?

14 A Yes.

15 Q Why did you have -- was -- was -- was Ms. Ball one of the
16 lawyers who participated in those calls?

17 A Yes.

18 Q Why did you have both Ms. Ball and Mr. Hertzberg
19 participate in those calls?

20 A Well, we wanted to make sure that they were fully
21 informed and prepared if those calls broke down from the legal
22 perspective to take appropriate relief. There may have been
23 other attorneys involved in those discussions as well. I'm
24 just identifying Ms. Ball, Ms. Bennett, Mr. Hertzberg as the
25 principal ones participating.

1 Q Did those law firms, did Jones, Day and Pepper, Hamilton
2 prepare any legal analyses of the claims that the city might
3 have against the COPS and the swaps?

4 A Yes.

5 Q And those memos were conveyed to you, is that correct?

6 A Yes, I believe so.

7 Q Were any legal analyses prepared by Jones, Day or Pepper,
8 Hamilton regarding the pledge of the casino revenues that was
9 a part of the 2009 collateral agreement?

10 A Yes.

11 Q Without divulging the substance of the communications,
12 the privileged discussions that you might have had with Jones,
13 Day lawyers and Pepper, Hamilton, what kinds of claims were
14 addressed in the memoranda that you saw and/or heard about?

15 MR. HACKNEY: Your Honor, I'll just interpose an
16 objection on two fronts here. The first one is that during
17 the discovery on the forbearance agreement, we were -- we were
18 not actually granted the opportunity to obtain document
19 discovery and they did not provide us a privilege log.

20 But after the testimony of Mr. Orr in which he asserted,
21 I took advice on all these subjects, don't worry, I considered
22 everything and -- and took it into account, I asked counsel to
23 provide a privilege log so the extent to which we could see
24 were memoranda transmitted to Mr. Orr for his consideration.

25 These are complicated legal issues. These aren't the types of

1 things that you can just process by having a five minute
2 conversation with someone. And I think -- and -- and counsel
3 for the city refused to do that.

4 I think that they are now inquiring of testimony of the
5 witness that I don't have a fair opportunity to cross examine
6 the witness about. Even if it's not the substance of the
7 communication, if they were going to elicit testimony from Mr.
8 Orr about all the different memoranda and email that he
9 concluded that he considered as part of his decision, I think
10 it was incumbent upon them to produce such a privilege log so
11 that we could see that it maps up with the decision time frame
12 that's laid out around the negotiation.

13 MR. SHUMAKER: Your Honor --

14 THE COURT: You received memoranda from your lawyers
15 outlining claims that the city might have in regard to the
16 COPS and the swaps.

17 A Yes, claims and defenses, Your Honor.

18 THE COURT: And you're claiming the privilege as to
19 those memoranda?

20 A Yes, Your Honor.

21 THE COURT: And you're claiming the privilege as to
22 those memoranda even though you want to take \$270,000,000 from
23 the taxpayers of this city to pay to terminate those swaps?

24 A I am claiming the privilege, Your Honor.

1 MR. SHUMAKER: Well, Your Honor, responding to --

2 THE COURT: Just because the -- you have the
3 privilege doesn't mean you have to claim it.

4 MR. SHUMAKER: Well, Your Honor, that's true. But
5 the -- the city has asserted the privilege and --

6 THE COURT: I don't get it. How can I decide
7 whether this was a fair settlement without understanding what
8 the city's assessment of the strength of its claims against
9 the COPS and the swaps were? How can I do that?

10 MR. SHUMAKER: Well, Your Honor, you can do that as
11 I think we set forth in the -- our response to the motion in
12 limine on this point that the objectors filed, it's really an
13 objective standard. And you have the theories laid out by the
14 objectors. This -- this -- the city has, you know, asserted
15 the privilege, but obviously the consideration of those
16 claims --

17 THE COURT: Why has the city asserted the privilege?

18 MR. SHUMAKER: Well, Your Honor, it's not my
19 privilege, but --

20 THE COURT: I'm asking you. You're their lawyer.
21 Why have you asserted it?

22 MR. SHUMAKER: Well, Your Honor, you know, this is a
23 -- it is a well known effort to protect the city with regard
24 to its communications between, you know, its client and its
25 lawyers. The free exchange of ideas is critical to the

1 system.

2 And we were negotiating with large banks who would love
3 to have the Jones, Day, or the Pepper, Hamilton memoranda
4 revealed for all the world so it would inform their
5 negotiating position.

6 MR. CULLEN: If I may add one thing, Your Honor.
7 Thomas Cullen for the city. I think, Your Honor, that one of
8 the reasons we haven't disclosed those memoranda, and we
9 didn't want to disclose those memoranda, is that we may still
10 sue the banks. If we are in a position of --

11 THE COURT: All right. Let's walk down -- let's
12 walk down that road for a second. Assume the Court denies its
13 approval of this forbearance agreement and you wind up in
14 litigation, right.

15 They're going to file a complaint, or you're going to
16 file a complaint, or the other -- and -- and regardless the
17 other side is going to file a counter claim and sooner or
18 later you're going to file your motions for summary judgment
19 and answers to motions for summary judgment, or trial briefs
20 and answers to trial briefs, it's all going to come out.

21 MR. CULLEN: Your Honor, perhaps not -- not
22 suggesting to split the baby here, but we did have --

23 THE COURT: Let's pause. Let's just take a pause
24 here. It's a little early for lunch, but we're going to take

25 lunch now and I want you to think about how to resolve this

1 issue over lunch.

2 MR. CULLEN: May I suggest one thing, Your Honor?

3 THE COURT: Yes.

4 MR. CULLEN: There was a draft complaint and perhaps
5 the Court could -- we could certainly waive with respect to
6 that if we weren't on the subject matter waiver provision.

7 THE COURT: Let -- let -- let's reconvene at, it
8 will be 1:15, 90 minutes from now and -- and -- and you think
9 about what position to take that's in the best interest of the
10 city.

11 MR. CULLEN: I understand, Your Honor.

12 THE COURT: All right. We're going to be in recess.

13 (WITNESS KEVYN ORR WAS EXCUSED AT 11:43 A.M.)

14 THE CLERK: All rise. Court is in recess.

15 (Court in Recess at 11:43 a.m.; Resume at 1:18 p.m.)

16 THE CLERK: All rise. Court is in session. Please
17 be seated. Recalling case number 13-53846, City of Detroit,
18 Michigan.

19 THE COURT: It appears that everyone is here. Mr.
20 Shumaker.

21 MR. SHUMAKER: Good afternoon, Your Honor. Over
22 lunch I have to confess that I was thinking about what Your
23 Honor had told us at the pre-trial conference on Friday about
24 the proponent of a settlement being in a -- an awkward

1 at the same time -- at the same time asking for settlement of
2 the claims, it does not reveal the strengths and the
3 weaknesses in case the -- the Court decides that it can't
4 approve the settlement. And I've -- and I've kind of -- think
5 we find ourselves in that awkward zone.

6 We interpreted what you were saying, Your Honor, that you
7 did not want to know what Jones, Day or Kevyn Orr, or any of
8 the employees thought about the strengths and weaknesses of
9 the -- the case. You thought we were asking what did he
10 consider and were memoranda prepared. Did you receive advice
11 from counsel, were there -- was all of that considered. So
12 again I stand here awkwardly, or hopefully less so after --
13 after a busy lunch.

14 With regard to what your -- Your Honor has requested, I
15 guess my -- my answer is -- is twofold in nature. One, we
16 have -- I'm going to admit that there was a bit of scurrying
17 in the lunch and we have pulled together a -- a packet of what
18 I think Your Honor would find under normal circumstances
19 clearly privileged attorney/client communications and
20 attorney/client work product. And including draft complaints
21 that were prepared.

22 And in trying to figure out what to propose to Your
23 Honor, Rule 502(d) comes to mind of -- of the Federal Rules of
24 Civil Procedure. I'm not sure -- oh, I'm sorry, the Federal

1 controlling effect of a Court order. A Federal Court may
2 order that the privilege or protection is not waived by
3 disclosure connected with the litigation pending before the
4 Court in which event the disclosure is also not a waiver in
5 any other federal or state proceeding.

6 If Your Honor would like us to, we can make a motion or
7 Your Honor could, I imagine issue an order pursuant to 502(d)
8 right now in which we -- the city would provide those to Your
9 Honor and if Your Honor believes that we need to publish those
10 to the world, we will publish those to the world. If -- if
11 you're able to -- if the Court is --

12 THE COURT: I don't -- I have to interrupt you here.
13 I don't want you to misunderstand what my request was. I was
14 not requesting you to disclose privileged information. My
15 request was that you consider whether maintaining the
16 privilege is in the best interest of the city. That was my
17 request.

18 If you come to the conclusion it is, and you think you
19 can prove what you need to prove to get this settlement
20 approved, go for it. I think your challenge is more difficult
21 if you maintain the privilege. It's not impossible. That was
22 -- and I apologize to you if I wasn't clear enough on that
23 point.

24 MR. SHUMAKER: No, no. Yeah, I was just --

1 say in hindsight now that I understand what the issue was
2 regarding the privilege log that Mr. Hackney had raised, that
3 if I had understood when that motion was addressed briefly as
4 it was the other day, that these memos were the subject of
5 that request for a privilege log, I certainly would have
6 ordered it. And in fact I do order it now, I'm going to
7 change my order on that and order a privilege log.

8 MR. HACKNEY: So I have to clarify for the record,
9 Your Honor, to be very precise, there is actually a -- a
10 meaningful distinction about what you and I were talking about
11 on Friday and this issue. And if I could clarify it.

12 THE COURT: Oh, all right. Go ahead.

13 MR. HACKNEY: On the original forbearance agreement,
14 we were not entitled to any discovery period at the end of our
15 colloquy. And then after Mr. Shumaker indicated that this
16 would be an evidentiary hearing, the Court then said, okay.

17 THE COURT: Right.

18 MR. HACKNEY: I'll let you take depositions. But we
19 weren't allowed to engage in written discovery. And when you
20 engage in written discovery, that's what triggers the
21 privilege log coming back because that's what they withhold.

22 The privilege log you and I were talking about on Friday
23 was with respect to DIP discovery where we were entitled to
24 issues in written discovery and then they did not give us a

25 privilege log.

1 THE COURT: Okay. That was -- so that -- that was
2 my disconnect, okay.

3 MR. HACKNEY: Yes, sir. And I -- I wanted to
4 clarify that, but on the forbearance agreement after we went
5 through the depositions and there was the repetitive assertion
6 of the privilege, which I understood. I understand the
7 position that's being taken.

8 What I then said to the city was, I know I haven't been
9 given the right to take written discovery, but given the
10 widespread assertion of the privilege, and the complexity of
11 the issues, won't you please agree to produce to me a
12 privilege log so that what we could do is we can see --

13 THE COURT: Okay.

14 MR. HACKNEY: -- the deliberative process. Because
15 you'll see the memoranda and the email going to Mr. Orr on the
16 relevant issues.

17 You do have to disclose the subject matter of a
18 communication, even if you don't disclose the communication
19 itself. Then we'd be able to test the proposition that don't
20 worry, I considered the gambit of the issues. That's the
21 privilege log, it was a voluntary request.

22 My objection today was simply that having rejected that
23 request, I do think that they have now put the objectors in a
24 position where it's difficult to meaningfully cross examine

25 Mr. Orr even on the subject of what he considered. Because

1 you don't have access to seeing the -- the communications go
2 to him.

3 MR. SHUMAKER: And if I could address that, Your
4 Honor. At Mr. Orr's deposition, objectors count on the
5 assumption motion back when it was Your Honor's order was that
6 the city just proffered whoever was going to testify in
7 support of the assumption motion.

8 The -- the objectors' counsel did ask a number of
9 questions about what sort of topics, what sort of claims did
10 you consider Mr. Orr. And he was allowed to answer those
11 questions. That is similar to what you would find on a
12 privilege log.

13 But when they went deeper and they started asking what
14 about -- what were the likelihood of success on the merits
15 there, that's when I said that is invading the privilege.
16 That's how I drew the line.

17 And so in effect I think the objectors have the kind of
18 information that they would have received in connection with
19 the privilege log had we -- had there been written discovery
20 in connection with the assumption motion. And frankly, Your
21 Honor, that was what I was going to be asking Mr. Orr about.

22 THE COURT: So I -- I take it that it is -- it is
23 still the city's judgment that it is in the best interest to
24 maintain the claim of privilege as to whatever legal memoranda

1 the swaps?

2 MR. SHUMAKER: I have consulted with -- obviously,
3 Your Honor, it's the client, the city's decision.

4 THE COURT: Right.

5 MR. SHUMAKER: Mr. Cullen and I were given -- were
6 -- had very little time to speak with Mr. Orr prior to him
7 walking into the courtroom after lunch. And we simply posited
8 to him what we were going to propose the -- the twofold
9 proposal that I was going to make to Your Honor. We did not
10 ask do you want to fully waive the privilege which -- which we
11 could do if Your Honor would like us to do that.

12 THE COURT: Well -- sir?

13 MR. CULLEN: To -- to be hopefully slightly more
14 clear. What we said to Mr. Orr, or what we're saying to the
15 Court, is that we're willing to make A, these documents
16 available. We would like to have a 502(d) order with respect
17 to those documents which would restrict the waiver -- it would
18 make the documents available, but the privilege would not be
19 waived, the documents would be made available --

20 THE COURT: Available to the Court and to the
21 objecting parties?

22 MR. CULLEN: And to the objecting parties. As long
23 as they weren't waived.

24 Now, the other thing because we've changed direction on

1 interest of fully informing the Court of the other questions
2 that the Court pressed, one of them being what exactly was
3 conveyed in terms of the -- how are these theories used in the
4 negotiations in -- in detail.

5 What we would propose is the following. And this would
6 save the -- this would address both the Court's issue with
7 respect to the underlying memoranda and with respect to the
8 subject matter of those meetings.

9 We would propose to make Ms. Ball as a percipient witness
10 at those meetings who is charged with Mr. -- charged by Mr.
11 Orr with both formulating those theories and conveying them in
12 negotiations with the other side about potential litigation.

13 I don't know whether we'd call her a rebuttal witness or
14 not, profess to make her available for a deposition on those
15 topics and to authenticate those documents, many of which Mr.
16 Orr would not be in a position to authenticate even if he had
17 -- if he had seen them or not.

18 So what she would do -- what we would do, and propose to
19 the Court, is that we'd make Ms. Ball available for deposition
20 tonight and we'd put her on tomorrow with respect to those
21 issues. And they -- that we would make available for that
22 deposition -- for that deposition, the documents that we have
23 gathered which fit Your Honor's discussion here which are the
24 memos relating to the claims against the banks which were the
25 subject matter of the negotiations.

1 We have -- we may find some more, but we -- as of right
2 now, we have a -- a group of oh, maybe 25 documents that fit
3 that description including two draft complaints.

4 THE COURT: Including what?

5 MR. CULLEN: Including two draft complaints.

6 THE COURT: Mr. Hackney.

7 MR. HACKNEY: So this is sufficiently material that
8 I -- I do at some -- you know, I don't speak for the objectors
9 and I guess I have one suggestion.

10 Which is, I know the evidence and I question the
11 relevance of Ms. Ball's proffered testimony. And perhaps I
12 can make a suggestion to the Court.

13 Perhaps the Court might reserve its decision about this
14 until the end of Mr. Orr's cross examination. And also
15 perhaps until after I've been able to caucus with the
16 objectors. Because I, based on my knowledge of the record, I
17 do not understand how Ms. Ball's testimony would materially
18 change what we are talking about right now.

19 MS. ENGLISH: Your Honor, may I speak?

20 THE COURT: Yes.

21 MS. ENGLISH: I would just like to make two points
22 here and again I -- I would also echo Mr. Hackney's comments
23 that the objectors would like to caucus on these new
24 developments first.

1 think the assertion of privilege in the depositions of Mr. Orr
2 and Mr. Buckfire were much broader in fact than Mr. Shumaker
3 has represented to the Court.

4 In fact in Mr. Orr's testimony, I just want to read a
5 couple of lines to you, please. Mr. Hackney asked Mr. Orr
6 about what claims were being settled by the forbearance
7 agreement that the city had against the swap counter parties.
8 He said, and if I ask you to tell me what claims you have,
9 will you tell me or will you assert the privilege? Mr.
10 Shumaker responded, I would instruct the witness that that may
11 implicate attorney/client communications. And Mr. Orr then
12 responded, I would have no independent knowledge of what
13 claims the city may have other than discussions I've had with
14 my counsel so I would not answer. So I think the claim of
15 privilege was much broader.

16 The second point I would like to make is because the
17 assertion of privilege was made so much throughout the city
18 witnesses depositions, the city must be precluded from now
19 admitting privileged as evidence, waiving the privilege and
20 admitting that in trial. And opening up -- allowing us to
21 take a deposition of Ms. Ball would not be sufficient.

22 We would need to re-depose Mr. Orr and Mr. Buckfire and
23 possibly examine what other witnesses need to be deposed as
24 well as a result of this new development. Thank you, Your

1 MR. SHUMAKER: Your Honor, just to respond quickly
2 on the assertion of privilege. Let me read another quote,
3 this one from Ms. English at the -- the deposition of Mr. Orr
4 which was question from Ms. English. "Can you just list for
5 me what the topics were ..."

6 THE COURT: What page are you on?

7 MR. SHUMAKER: Page 16, Your Honor, of the objector
8 -- I mean the city's opposition to the objectors motion in
9 limine. It's Footnote 5. Ms. English asks, "can you just
10 list for me what the topics were on which you got advice or
11 would you claim the privilege as to just the topics as well?
12 Mr. Orr, maybe I can do it this way. I think I've said before
13 that in this case for instance your client Ambac, I filled
14 that in, has filed an objection. Ms. English, yes, it has.
15 Mr. Orr's response, and in this case many objections have been
16 filed and many of the topics listed in those objections,
17 whether it was subordination, prioritization, equitable
18 estoppel, tort, invalidation of liens ab initio, whatever they
19 were, none of those analyses or claims came as a surprise to
20 me and that in some fashion without divulging what I had
21 spoken with to my counsel, in some fashion issues such as
22 those have been discussed and analyzed with my counsel,
23 attorneys, and advisors".

24 I don't think Ms. English is -- is giving you an accurate
25 picture of what happened there. There was a lot of assertion

1 of privilege because of the awkwardness that Your Honor had
2 noted.

3 And so we were trying to draw the line in a way that was
4 permissible and allowed the objectors to get at the kind -- we
5 talked a little bit about this, Your Honor, in the opposition
6 too which is really it's for Your Honor, it's not for Mr. Orr
7 to decide -- he obviously has to make a decision as to whether
8 -- whether to enter into the agreement, but you have all of
9 the claims spelled out for you.

10 And -- and it's your -- you know, your decision, your
11 objective decision as to whether it was reasonable to
12 compromise those claims. And we also quoted in that --

13 THE COURT: Here's the -- here's the difference.
14 You know, I -- I think back to the hundreds or thousands of
15 motions to settle that I have been called upon to determine in
16 the last 28 1/2 years. And in virtually every one of those
17 cases, everyone knew what the claims were, what the defenses
18 were, what the factual -- the alleged factual bases were for
19 those claims, the alleged factual bases for the defenses, and
20 where the strengths and weaknesses were on either side.

21 I don't have that here. Not -- not from your brief and
22 not yet at least from Mr. Orr. I certainly didn't get it from
23 Mr. Buckfire. So I'm at a loss as to how to evaluate the
24 fairness of the settlement without that data.

1 THE COURT: And so I -- and I think the burden is on
2 the city to -- to -- to show the fairness of the settlement,
3 right?

4 MR. SHUMAKER: Correct, Your Honor.

5 THE COURT: So you know, this is -- in the end it's
6 your call. I mean you have to decide how you want to persuade
7 me regarding the fairness of this settlement if you -- and if
8 you fail, the motion is denied. You don't want that.

9 MR. SHUMAKER: Understood.

10 THE COURT: At least I don't think you do.

11 MR. SHUMAKER: That's correct, Your Honor. And I
12 guess the -- the -- for the Court's consideration is this.
13 Although this is not your normal 9019 situation.

14 You do -- the Court does know what the -- the subject of
15 the -- of the potential legal attacks are, the -- the swaps
16 and the -- the pledge of the collateral. And at -- at this
17 stage, given all the different considerations that were going
18 on and that have been described to you with regard to the
19 city's financial condition at the time of May to June and the
20 May numbers came in and they were much worse than anyone
21 thought. And the -- the city had very limited time.

22 I would suggest that Your Honor you -- there is no full
23 factual record here for you to review because the settlement
24 decision had to be made very quickly under the dire

25 circumstances that Mr. Orr and the city faced.

1 And so you do have the theories. You do have the
2 subjects. You do have Mr. Orr who will say that I was given
3 plenty of legal memoranda and -- and emails and -- and
4 counsel. And then if Your Honor believes that that's not
5 sufficient, I mean I agree that there is a decision that --
6 that -- that we need to make. And that's why we're trying to
7 find a compromise.

8 THE COURT: Since you've raised the question, I'm
9 going to say this to you. Every transaction, including this
10 one, that the city has entered into in connection with these
11 swaps and COPS has been with a gun to its head.

12 That has to stop. It has to stop. And -- and I think
13 it's part of a Bankruptcy Judge's role to carefully scrutinize
14 a debtor's request to approve a settlement when that
15 settlement was made with the debtor's -- with a -- with a gun
16 to the debtor's head. I mean --

17 MR. SHUMAKER: We dare not agree -- we could not
18 agree to --

19 THE COURT: Just one more thought.

20 MR. SHUMAKER: I'm sorry.

21 THE COURT: And the reason is obvious. Because, you
22 know, it's not just the debtor who is impacted by this, right.
23 I got a whole courtroom full of people who are impacted by
24 this.

1 know, if you want me to do that, I'm happy to. If you -- if
2 you want to take your chances, that's your call.

3 MR. SHUMAKER: Two responses to that, Your Honor.
4 First, we couldn't be in more complete agreement. Under the
5 circumstances they were not perhaps ideal given the financial
6 emergency that was in place.

7 Mr. Orr came in in April. The numbers that Mr. Malhotra
8 and Ernst and Young provided in May showed holy cow, we're
9 running out of time. And so no one likes to make a decision
10 with a gun to their head, but a big big reason why we believe
11 that this -- this forbearance agreement is necessary and the
12 post-petition financing is needed to finance it, is to
13 stabilize the city. That is exactly what we're trying to do.
14 We don't -- we know it's not ideal, but this is how we come to
15 -- that's how Mr. Orr came to the -- came to the problem.

16 THE COURT: You know, stabilizing the city is
17 exactly what motivated the original swaps and COPS. And it's
18 exactly what motivated the 2009 transaction and look where we
19 are.

20 MR. SHUMAKER: It's not a great spot, I agree with
21 Your Honor. But that's why Mr. -- a financial emergency was
22 declared and Mr. Orr was put in to take the steps necessary to
23 right the ship. And I don't know how he can right the ship
24 without keeping these casino revenues available to the city so
25 they can be used to do bigger and better things as opposed to,

1 you know, serve as collateral that can be tied up by a couple
2 of banks for as long as they want. Which is the -- the
3 difficult decision Mr. Orr faced.

4 THE COURT: Of course, but the question is whether
5 you're overpaying for that, right?

6 MR. SHUMAKER: Yes, Your Honor.

7 THE COURT: Or one -- one of the questions.

8 MR. SHUMAKER: Yes, Your Honor.

9 THE COURT: And that depends -- I don't know why the
10 considerations for that determination in this case should be
11 any different than in any of the other hundreds or thousands
12 that I've dealt with.

13 MR. SHUMAKER: Understood, Your Honor. And I guess
14 that's why we -- we tried to come up with a compromise over
15 lunch which was if Your Honor's willing to enter the 502(d)
16 order so that there's no some broad expansive waiver, and if
17 Ms. Ball can get on the stand and explain what -- what the
18 advice that you will see is and how that was communicated to
19 the other side, you clearly are going to be in a much much
20 much better position to be able to determine whether the city
21 is overpaying.

22 THE COURT: Well, let me ask the -- well, the
23 objecting attorneys have -- or the attorneys for the objecting
24 parties have requested an opportunity to -- to caucus

25 regarding this and I think it is appropriate to grant that.

1 How much time would you like?

2 MR. HACKNEY: Can we have 20 minutes?

3 THE COURT: Absolutely.

4 MR. HACKNEY: Can we reconvene at 2:00, Your Honor?

5 THE COURT: Yes. We will reconvene at --

6 MR. HACKNEY: Yeah.

7 THE COURT: I'm sorry?

8 MR. HACKNEY: Whatever works for you. I'm sorry.

9 THE COURT: I'm here regardless. So let's say 2:00.

10 If you find you need a few more minutes, you know, we'll work
11 that out. In the meantime, I urge -- I urge you all to
12 consult among yourselves on both sides to see what the best
13 way to resolve this is.

14 MR. SHUMAKER: Thank you, Your Honor.

15 THE CLERK: All rise. Court is in recess.

16 (Court in Recess at 1:42 p.m.; Resume at 2:00 p.m.)

17 THE CLERK: Court is in session. Please be seated.

18 MR. HACKNEY: Your Honor, can I approach the podium?

19 THE COURT: Yes. Which reminds me, I've been asked
20 to remind everyone again that -- that when you address the
21 Court to speak near a microphone, not only so that it's on the
22 record, but so that the people in the overflow courtrooms can
23 hear as well.

24 MR. HACKNEY: Will do, Your Honor. Thank you for

1 Your Honor, the objectors have caucused together and what
2 we did was we basically articulated kind of broad principals
3 and order and then determined that there was no objection to
4 my relaying this to the Court on behalf of all of the
5 objectors.

6 THE COURT: Okay.

7 MR. HACKNEY: That's the easiest way to operate when
8 you have a lot of people.

9 THE COURT: Yes.

10 MR. HACKNEY: So, Your Honor, with respect to the
11 idea that they might produce these memoranda that they're
12 referring to, and then produce Ms. Ball for a deposition in
13 the nighttime tonight that we would -- and then she would then
14 testify tomorrow.

15 The objectors do not believe that that proffered
16 testimony would be relevant. Because, Your Honor, the record
17 shows, and I can relay additional record evidence that's not
18 yet in the record, but is about to be, moments from now. But
19 the record for Mr. Buckfire's testimony shows that he was the
20 lead negotiator on the deal. That he had not evaluated any of
21 the claims of the city and that he was unaware as to whether
22 anyone else had done so either at the time he was negotiating
23 the deal.

24 That he never argued the city's case to the swap counter
25 parties. And that he never witnessed anyone else do so

1 either. That testimony, I think, is -- is compelling
2 testimony and what they now want to do is they effectively
3 want to rebut their own case by calling in Ms. Ball to back
4 and fill and say no, I was -- I was heavily involved in
5 arguing and threatening the swap counter parties and fully
6 apprised of all the various issues.

7 We don't think that Ms. Ball's testimony is sufficient to
8 contradict the record evidence of Mr. Buckfire's testimony
9 that he was the lead negotiator on this deal and that he never
10 saw anyone else do this and is unaware of it. We think that
11 -- that -- that the city --

12 THE COURT: Well, assuming what you say is true, I
13 don't know that it is, but assuming it is for this -- for this
14 purpose, that doesn't make the testimony inadmissible, does
15 it?

16 MR. HACKNEY: Well, it would --

17 THE COURT: It may go to its weight, but does it go
18 to its admissibility?

19 MR. HACKNEY: I -- well, I think what you would say
20 is that it doesn't make it inadmissible because the two
21 witnesses can contradict each other. And she can come in and
22 say, oh, here's all the stuff that Mr. Buckfire somehow forgot
23 happened on the deal that he was the lead negotiator on.

24 Okay. Fine, it's a theoretical matter. But the idea

1 the list where the city insisted that only those witnesses
2 testify, and that the only other people that could be
3 identified by a date certain were rebuttal witnesses.

4 That they're now going to add a witness as a rebuttal to
5 their own case before their case in chief is done. That's out
6 of the order and prejudicial to us and now we have to take the
7 rush deposition.

8 But in addition, I think what the Court can do, is the
9 Court can say, I saw Mr. Buckfire testify and I'm not going to
10 allow you to back and fill your way out of that. And I'm not
11 going to go through extraordinary steps to do it. And that's
12 our second point.

13 Which is if you decide that given the -- the significance
14 of this settlement and all that goes into it, consistent with
15 the comments that you've made, that you want to hear the
16 testimony and you want to see the documents. You think that's
17 appropriate to your decision.

18 Then we -- we will understand that. But then we will
19 say, we have got to do this in an orderly way. That --

20 THE COURT: I'm just going to stop you there.
21 Because I -- I view what I want as irrelevant. It's not my
22 motion.

23 MR. HACKNEY: Let me rephrase if I could. If the
24 city decides no, you know, we have to do this. We -- we are

25 going to give these documents. We've decided to change our

1 case in response to the Court's comments. We have to have Ms.
2 Ball testify. Then our point is that this must be done in an
3 orderly way.

4 THE COURT: Uh-huh.

5 MR. HACKNEY: And that means not just a rush
6 deposition of Ms. Ball tonight with the five documents that
7 they picked out and said look at these. It's let's get order
8 to the discovery. Let's get order to the -- where the
9 privilege being asserted, where not.

10 Let's take the depositions in an orderly way and Mr. Orr
11 is going to, you know, hate me for saying this, but we will
12 have to re-depose certain witnesses. I mean when you roll out
13 with these -- these documents --

14 THE COURT: He won't -- he won't hate you.

15 MR. HACKNEY: Well --

16 THE COURT: He may dislike you, but he won't hate
17 you.

18 MR. HACKNEY: These are --

19 THE WITNESS: Well, Your Honor.

20 MR. HACKNEY: We teach our -- at work we teach our
21 daughters that you're not supposed to say hate, but I think
22 that --

23 THE COURT: Right.

24 MR. HACKNEY: -- people actually do hate

25 depositions. The --

1 THE COURT: All right. I'll accept that.

2 MR. HACKNEY: So that -- that was our second point
3 which -- and the only thing we wanted to say though was in
4 support of this idea that if the city changes and says, here
5 you go, here's all the stuff that we relied upon and here's
6 Ms. Ball who was the legal eagle on the deal.

7 You know, we articulated in the motion in limine that we
8 filed a long time ago in anticipation of the first hearing,
9 this was a big issue for us. Because we had lived through the
10 depositions and had raised the questions and seen the
11 assertion of the privilege.

12 And, you know, I think that the city waiting all the way
13 until the last week, I think on the 9th, even to respond to
14 that in limine motion. And I think that should factor in
15 somewhat to the Court's consideration of whether if the city
16 decides to go in this fashion, whether it will allow the types
17 of rush depositions that are sometimes appropriate in
18 different contexts where it's like sufficiently not material
19 that you're like oh, we're just going to get it done and
20 you'll have to stay up late and do a cross tomorrow, but you
21 can do it.

22 This is core. So given that we put this issue out there
23 to try to join issue on the city with it and the city, you
24 know, didn't respond until recently and has now sort of

1 limine, now we're thinking about saying we kind of agree with
2 it. That's a sufficiently material change. I think it should
3 factor in to your consideration of the time line. If I can
4 make one last comment.

5 The gun that's to our head in this case from the
6 standpoint of schedule, you know, at first it was the discount
7 posts in the forbearance agreement. You know, so it's like we
8 got it -- you know, this was the way there was a -- you talked
9 about a gun to the head of the city. There was a little bit
10 of a gun to all of our heads under the schedule. Because it's
11 like we have to do this by this time to get this by this time.

12 But then the original hearing was just adjourned for
13 several months and it turned out the discount post extended
14 out by four months when they -- after the hard fought
15 negotiations had only been able to get like six weeks.

16 Now there's -- that's a bit of a gun at our head, is now
17 it really expires on December 31 and so we have to get it
18 done. And then also is the Barclays commitment expires on
19 January 7th.

20 That's another gun to our head from a scheduling time
21 frame. And given -- I will say given the holidays, this --
22 these all don't go together very well if we adopt this second
23 course.

24 And what I wanted to say is that if we go this way, I've

1 potential DIP lenders and ask them about certain provisions in
2 their agreements and ask them, is that -- that January 7th, you
3 know, as firm as it says there in black and white. And -- and
4 in some instances, Your Honor, and we often heard debtor's
5 counsel as well, but it turns out that -- that it was
6 flexible.

7 And I think that if we -- I know that we don't know which
8 way we're going. But if we're going to go this second way,
9 can't we have a practical conversation about this? Because
10 this scheduling gun to our head, and this is isn't a harangue,
11 it's an observation.

12 It's -- it's infected everything. It's infected how much
13 discovery we did, the scope, the pace of discovery, and it's
14 had an impact on our ability to present the case to you -- to
15 you. Bless you, Mr. Orr.

16 And I think that you've made observations today about the
17 magnitude of this transaction and its significance that if we
18 could get a little bit of the gun stopped to be pointing at
19 our head as we're considering this idea of what's the schedule
20 going to be, what is the process going to be from the
21 standpoint of discovery. If we go that second way, I think
22 that will be important to the objectors. That's all I have to
23 say, Your Honor. I don't know if other objectors would also
24 like to be heard, but that -- that's the consensus. Thank

25 you.

1 THE COURT: Thank you. Mr. Shumaker.

2 MR. SHUMAKER: Your Honor, a couple of points.

3 First of all, Mr. Hackney has talked about how important this
4 issue of the assertion of the city's privilege has been to the
5 objectors for a long time.

6 Your Honor should not think that this was anything other
7 than calculated from the beginning. Back when Mr. Orr was
8 deposed, the first question that Mr. Hackney asked was, Mr.
9 Orr, in the course of negotiating and executing the
10 forbearance agreement, did you receive legal advice? Answer,
11 yes.

12 And then five questions later, after some predicate, who
13 did you get the legal advice from. Five questions later, from
14 Mr. Hackney. Are you waiving the attorney/client privilege in
15 connection with the motion to assume the forbearance
16 agreement? When that answer was no, that led to about 50
17 questions intended to invade the city's privilege.

18 In that motion in limine, opposition that Mr. Hackney
19 referred to, that the city has put forth, it's been very clear
20 in the -- in the Washington Mutual case, which I believe is in
21 the Bankruptcy Court in one of the districts in New York, the
22 agreement was very clear that with regard to this kind of
23 motion you do not need to waive.

24 So that's one thing. I think that this -- the notion

1 was a tactic from the get go. The second thing, is that this
2 gun is not going away.

3 THE COURT: Look, everyone uses tactics. The
4 question when you talk about tactics is, is it -- is it a
5 legitimate tactic, right?

6 MR. SHUMAKER: Well --

7 THE COURT: You can't say it was illegitimate.

8 MR. SHUMAKER: No, and I --

9 THE COURT: I asked the same questions just before
10 lunch that Mr. Hackney asked in -- in this deposition that you
11 quoted from.

12 MR. SHUMAKER: I was not suggesting you were
13 undertaking a tactic, Your Honor, not in the least.

14 THE COURT: Okay.

15 MR. SHUMAKER: But I -- but I -- but I was -- I was
16 commenting on it because -- because of the awkward position
17 that the city finds itself in. And it does not believe it
18 needs to waive but --

19 THE COURT: Well --

20 MR. SHUMAKER: Appreciate your honest concern.

21 THE COURT: But as far -- you know, as I've said
22 before, the burden is on -- if you want to -- to put these
23 memos in with this 502(d) order we can talk about that. If
24 you want to call Ms. Ball, we can talk about how to -- how to

25 properly create an orderly process to do that.

1 But as I said before, this -- this approval will get the
2 closest scrutiny from me and it's your burden. So, you know,
3 you have to decide what you want to do to -- to meet that
4 burden.

5 MR. SHUMAKER: Yes, Your Honor. Perhaps --

6 THE COURT: And I can tell you, that I agree with
7 Mr. Hackney. That if -- if we're going to open it up in the
8 -- in the ways that you and Mr. Cullen have -- have suggested,
9 it's not going to be done today and tomorrow. And I'm not
10 available between December 22nd and January 1st.

11 MR. SHUMAKER: May I consult with my colleagues,
12 Your Honor, for a minute?

13 THE COURT: How much time would you like?

14 MR. SHUMAKER: Ten minutes, Your Honor.

15 THE COURT: Mr. Hertzberg says you want ten minutes.

16 MR. SHUMAKER: Yes, please, Your Honor.

17 THE COURT: We'll be in recess for ten minutes.

18 MR. SHUMAKER: Thank you, Your Honor.

19 THE CLERK: All rise. Court is in recess.

20 (Court in Recess at 2:13 p.m.; Resume at 2:41 p.m.)

21 THE CLERK: All rise. Court is in session. Please
22 be seated.

23 MR. CULLEN: Good afternoon, Your Honor.

24 THE COURT: Sir.

25 MR. CULLEN: The city would like to -- to propose

1 the following. If that -- if it makes sense to the -- to the
2 Court.

3 Given the Court's guidance, given the procedural posture
4 we're in now, given the concerns of the objectors about the
5 ripeness of the various issues in front of us, and given our
6 need to reach out to other parties to talk about how we can
7 accommodate all of those things, what we would propose is that
8 we and the other parties take tomorrow to try and work out a
9 procedural schedule for your -- Your Honor.

10 We will in that -- in the course of that time, to be
11 frank with all concerned, we'll have to -- we will be reaching
12 out to the -- the counter parties, the Barclays about what we
13 can do with them.

14 In our discussions with the objectors, we will be talking
15 about various things, including the -- the options I've laid
16 forth before the Court and see if we can get the -- we can
17 cabin those in such a way so that we can get the right
18 discovery and the right things in front of the Court. And --
19 and get to the Court -- do something within the Court's
20 schedule and in a way that will allow us to stop the city
21 paying money on a notional \$800,000,000 rather than the amount
22 of 270,000,000, the settlement amount.

23 So that's all the things we're going to try and
24 accomplish tomorrow to make this easier. I can also tell the

1 questions about the various underlying deals and the history
2 and the issue of -- of -- of gun to the head.

3 The banks who are in the room here and the counter
4 parties in the post-petition financing are also in the -- in
5 the room here. They have been educated as well.

6 We have asked to the objectors to discuss with us
7 tomorrow among the other things that they would discuss, if --
8 if in their view there is a -- a number, a sweetening of the
9 deal that would make it go away. It is my suspicion that
10 there is no number that makes all of them disappear, but it's
11 an issue.

12 And we would propose then to report back to the Court on
13 Friday if that would be amenable to the Court's schedule about
14 what we have achieved with respect to all of those procedural
15 and financial constraints to lay at the front of the Court
16 because I think otherwise we're going to have a series of
17 running hand battles while the -- while witnesses sit here
18 that won't be productive for -- for anyone.

19 And I'm sensible to the fact that it's taken a long time
20 for us all to schedule this. We have a lot of money invested
21 in this -- in this proceeding to date. We're going to see
22 what we can preserve of that. That will also be part of what
23 we are -- what we are talking about.

24 THE COURT: All right. Mr. Hackney.

1 THE COURT: Sure. Sir.

2 MR. HACKNEY: So, Your Honor, I'm going to state
3 what I think the sense of the senate is and perhaps then we
4 can just poll the room and see if any -- if I got it wrong.
5 But I think I -- I think I can say that it is the sense of the
6 objectors that what the city is -- is asking the Court to do
7 is to continue the hearing on its motion until a later date.

8 And I think that the objectors would -- this -- I think
9 the objectors would agree to that continuance. I will note
10 that there has been a lot of money spent getting ready for
11 this hearing to get it done, but whatever things change and we
12 acknowledge that.

13 So -- but I just offer that, you know, agreeing to a
14 continue it I think is -- is a sign of good faith. And I also
15 say the objectors I think are willing to meet with the city
16 and hear the city's ideas about how to handle evidence and
17 discovery and so on and so forth. So we are amenable to that
18 idea.

19 I wanted to offer two -- two points for the Court's
20 consideration. One of them is that I hope the city will think
21 about the fact that it's not clear the extent to which you can
22 change this evidential record with new evidence. So I think
23 that should be a consideration for the city.

24 And I also don't want to -- I'm not backing off what I

1 respect to this deal and -- and I just wanted to reiterate
2 that point.

3 The second one is that having lived under the gun of
4 these deadlines before, I would like the city to make sure
5 that it's expressing our views about process to the folks that
6 are setting these deadlines, whether it's the discount or the
7 expiration of a commitment.

8 I -- you know, it will -- it will be a problem for us if
9 they come back and say Barclays was very accommodating,
10 they've extended it from January 7th to January 9th and so we're
11 going to do all this over the Christmas week. And then we're
12 going to come back on January 2nd and do it again.

13 That's going to be a problem for the objectors, I think.
14 And I want to say that now just so it's not a surprise later.
15 Long way around, if the city is asking for a continuance we
16 would not object to it.

17 We did want to confirm that Friday's hearing would be a
18 -- in the way of a status conference to report to you on
19 progress we've made in sorting this puzzle out. Thank you.

20 THE COURT: Thank you, sir. Mr. Cullen, to -- to
21 the extent I heard you say that you are willing to use the
22 time of any continuance in an attempt to re-negotiate the deal
23 that you are asking me to approve, I would encourage that as
24 strongly as I can.

1 as long as we all have, or in litigation even for that matter
2 knows, that even if -- even if a winning party gets a
3 judgment, they'll take 75%. Do you hear what I'm saying?

4 MR. CULLEN: I understand you, Your Honor.

5 THE COURT: All right. What time on Friday?

6 MR. CULLEN: What time is good for the Court?

7 THE COURT: Well, I'm here, so --

8 MR. CULLEN: 10:00.

9 THE COURT: 10:00, is that all right with everybody?

10 All right. I'll see you then.

11 THE CLERK: All rise.

12 THE COURT: If it's not this room, ladies and
13 gentlemen, one second. If it's not this room, we'll post a
14 notice on ECF, otherwise assume it's this room.

15 MR. SHUMAKER: Thank you, Your Honor.

16 MS. GREEN: Thank you, Your Honor.

17 THE COURT: Court is adjourned.

18 (Court Adjourned at 2:50 p.m.)

1
2
3
4
5
6
7 We certify that the foregoing is a correct transcript from the
8 electronic sound recording of the proceedings in the
9 above-entitled matter.

10
11 /s/Deborah L. Kremlick, CER-4872
12 Letrice Calloway

Dated: 11-20-13